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In the

Supreme Court of the United States

PAUL D. KERIAN, *PETITIONER*

Versus

LOUIS CALDERA, SECRETARY OF THE ARMY, et al., *RESPONDENT(S)*

On Petition for A Writ of Certiorari to the United States Supreme Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where "military" activities violate the Geneva Conventions, federal law and/or military regulations, do textual commitments in the U.S. Constitution limit members of the U.S. military's right to Due Process, judicial review and forms of relief such as, civil rights protection, class action certification and the protection of customary international law?

2. Where Petitioner reported war crimes and advised superiors of his intent to report war crimes, was Petitioner entitled to whistleblower protection to include administrative and judicial review under the "preparing" to contact Congress language in 10 USC 1034?

3. Where Petitioner diligently pled and pursued administrative and judicial remedies, where the Military violated Federal statutes, its own regulations, and where the Military acted in bad faith in its investigation of whistle blower reprisal and war crimes, did the lower court commit reversible error when it pre-terminated Petitioner's claims or in ruling challenge of unlawful discharge was barred by the statute of limitations?

PARTIES TO THE PROCEEDINGS: The parties to this proceeding are, the Petitioner, Pro Se, Paul D. Kerian and the Respondent(s) in their representative capacities: The Honorable George W. Bush, President of the United States; The Honorable, Donald Rumsfeld, Secretary of Defense (DOD); and, The Honorable, Francis Harvey, Secretary of the Army.

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CONSTITUTIONAL PROVISIONS

[....(U.S. Const., Article 3, cl. 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made....")....

....(U.S. Const., Article 6, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.....")...

...(U.S. Const., Fifth Amendment. "No person shall . . . be deprived of life, liberty, or property, without due process of law.")....]

CITATIONS TO ADMINISTRATIVE AND JUDICIAL OPINIONS

The executive branch administrative legal process appealed from is unpublished and appended at APP E-K (A64-A155). The memorandums of opinion of the Federal District Court for the Eastern District of New York (EDNY) are unpublished and appended at APP A&B (A1-A59). The decision and denial of rehearing (suggested en banc) of the United States Court of Appeals for the Second Circuit are unpublished and may be found at APP C & D (A60-A64)

JURISDICTION

In a Revised Memorandum and Order, dtd October 28, 2003, DJ Trager, in The Federal District Court for the Eastern District of New York, finally modified his earlier Revised Memorandum and Order APP A, (A1-A44) and dismissed all Petitioner's complaints while denying leave to amend. APP B, (A45-A59). On December 9, 2004 United States Court of Appeals for the Second Circuit summarily affirmed. APP C, (A60-A62). Reconsideration (suggestion en banc) was denied March 31, 2005. APP D, (A63-64). This appeal was timely filed (w/i 90 days) with jurisdiction provided by 28 USC 1254 (1). Federal Questions (28 USC §1331) provided subject matter jurisdiction at the initial trial Court level along with The Administrative Procedures Act 5 USCS § 706, APP W, (A298) and other basis detailed in Petitioner's amended complaint at APP AA, (A344-A384).

STATEMENT OF THE CASE

Only the Supreme Court can resolve the legal matters that Petitioner presents because Executive Branch misconduct and judicial abstention have created an environment where Treaties, Federal law, fundamental human rights and Supreme Court precedent are flagrantly disregarded with impunity.

To deny review of Petitioner's complaint as time-barred and non-justiciable by sustaining the EDNY and the Court of Appeals b/ . ngs deprives Military service members of Constitutio statutory and regulatory protections. To deprive judicial review is to deprive military service members of any meaningful protection when they refuse to obey unlawful military orders.

REASONS FOR GRANTING THE PETITION

Supreme Court review could resolve conflicts between Federal Circuits on review-ability of military decisions as well as conflicts between the Federal Circuits on appropriate types of relief (equitable relief, civil rights protection, class action protection) available in military cases. Supreme Court review is also necessary because judicial process and proceedings to date entail judicial conduct that has so far departed from accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. Executive branch misconduct and judicial abstention of record together describe a war crime facilitative environment that disregards, treaty obligations, military regulations, military service member rights, and the rule of law.

The record shows multiple instances of Executive branch failure to follow the U.S. Constitution, Federal laws (statutes) and the Geneva Conventions (not self-executing) even though implemented (executed) by military regulations:.....**pg 8**

A. Disregard of Whistle blower regulations.....**pg 11**
B. Disregard for Law of War Regulations.....**pg 15**
C. Disregard for ABCMR Regulations.....**pg 17**

10 USC 1034 protects Military whistle blowers even those "preparing" to blow the whistle.....**pg 18**

Contrary to the EDNY dismissal, 10 USC 36 sec 628 (g) (i) specifically provides for judicial review of "military"

decisions, such as the supplemental whistle blower reprisal heaped upon Petitioner by the Army Special Review Board (SRB) hearing his efficiency report appeal.....**pg 26**

Clearly erroneous rulings of record regarding the statute of limitations facilitate inhumanity with misguided deference to executive authority, which ignores the rule of law, equitable factors, judicial responsibilities and the human (civil) rights of military service members.....**pg 27**

POINT I : The U.S. Constitution, Federal Statutes and Supreme Court Precedent entitle a member of the U.S. military to judicial review, equitable relief, class action protection and civil rights protection to redress "military" activities violating federal law and military regulations. U.S. Const., Article 3, cl. 2.

I. The record shows multiple instances of DOD/DA failure to follow the U.S. Constitution, Geneva Conventions and their own military regulations:

After the cease-fire agreement of Desert Storm, Petitioner, as Judge Advocate responsible for the legalities of refugee operations, objected to the forced "repatriation" and weaning of @10,000 Iraqi refugees from Saudi Arabia to Iraq. Some of these returnees were shot and killed while being "weaned" from dependency on Coalition forces. APP E, (A64-A81). Petitioner interrupted actions that he perceived to be in violation of the Geneva Conventions IV. APP Q, (A179-A256), pertaining to non-combatants such that all so engaged were involved in a criminal conspiracy or attempt to violate the law of war. See e.g., Provisions of 18 USCS § 2441, APP L, (A158), which provides in relevant part:

> **(a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b),**

shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.... (c) Definition....."war crime" means any conduct.... (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949.....]

Article 146 of the Fourth Geneva Convention of 1949 APP Q, (A 246) on the Protection of Civilian Persons in Time of War, requires parties to enact legislation to provide effective penal sanctions for those committing or ordering to commit "grave breaches" of the Convention; and to search for such persons and to bring them to trial. On this issue Article 147 prohibits as grave breaches actions involving:

....willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in forces of a hostile Power, or willfully depriving a protected person respectively of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The criminal misconduct, refoulement, was also a breach of the Refugee Convention. See, Art 33, Protocol Relating to the Status of Refugees, Nov. 1, 1968, U.S.T. 6223 The United States is not a signatory to the U.N. Refugee Convention itself, but rather to the Protocol, which bound all signatories to comply with the substantive provisions of

Articles 2-34 of the U.N. Refugee Convention. See I.N.S. v. Stevic, 467 U.S. 407, 416, n.9 (1984).

> **Art. 33, of the Protocol Relating to the Status of Refugees states: (1) "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.."**

Current and historical Department of Defense Law of War Programs specifically require the U.S. Armed Forces to comply with international laws of armed conflict. See e.g. U.S. Dep't of Def., Department of Defense Directive Number 5100.77: DoD Law of War Program (Dec. 9, 1998), APP R, (A256-A264)

DOD Dir 2301.1, DOD Dir 5100.77 APP R, (A256-A264) **and JCSI 5810.01B,** APP U, (A278-A289) incorporate the Geneva Conventions effectively making them among the military law of war regulations referred to below

II. The U.S. military's compliance or non-compliance with the Geneva Conventions, Whistleblower Protection law, and its own regulations, in a specific case, are legal questions. In this context a Military Service Member's duty to comply with and his or her right to be protected by Treaties, Federal laws and regulations are primarily "legal" (and not military) in nature.

The Federal Circuit Courts are split with respect to when judicial intervention into military related matters is appropriate and the appropriate nature of judicial relief in such cases. The majority of circuits apply a multi-factor test to determine the reviewability of claims that challenge

internal military decisions. See Mindes v. Seaman 453 F.2d 197 (5th Cir. 1971). Moreover, justiciability analysis, or the primary jurisdiction doctrine, limits the types of claims that service members may bring before the federal courts. Mindes, 453 F.2d 197 at 199.

The Mindes test has not been approved by the Supreme Court. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986). Moreover, the Second Circuit has neither specifically adopted nor followed Mindes but has found that certain discretionary decisions by military officials (within their authority) may not be justiciable. Jones v. New York State Div. of Mil. and Nav. Affairs, 166 F.3d 45, 52, 54 (2d Cir. 1999); Kurlan v. Callaway, 510 F.2d 274, 280 (2d Cir. 1974).

The Supreme Court has never clearly distinguished justiciable from nonjusticiable intramilitary claims for equitable relief. Here the Circuits are also split. See, e.g., Dibble v. Fenimore, 339 F.3d 120, 126, 126-128 (2d Cir. 2003) (federal circuit courts of appeals split as to when intramilitary actions for equitable relief are reviewable).

The Second, Fourth, Fifth, Seventh, Eight, and D.C. Circuit Courts of Appeals allow equitable actions that set forth broad challenges to the constitutionality of military rules or regulations. Dibble, 339 F.3d at 127-28; Scott v. Rice, No. 92-2463, 1993 U.S. App. LEXIS 24641 (4th Cir. Sept. 23, 1993); Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993); Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989); Kreis v. Sec'y of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989). The Second Circuit held out the possibility that exceptional circumstances of cases may merit departure from the general rule of nonreviewability of military decisions. Dibble, at 126.

If the U.S. military is in compliance with the Geneva

Conventions, the Whistleblower Act, and its own regulations are legal questions. It follows that the extent of a Service Member's duty to comply with and to be protected by International and Federal law and Federal regulations is properly reviewed as a "legal" matter. U.S. Const., Article 3, cl. 2 (Quoted above).

The Second Circuit's failure to consider Petitioner's class action constitution, allow a jury trial and premature dismissal of Petitioner's civil rights cause of action are reversible errors because Military service members are vulnerable citizens entitled to the protections of the U.S. Constitution and careful--perhaps heightened-- judicial scrutiny. A military service member's duty to respect human rights and to refuse to violate human rights is fundamental and Constitutional (involving the right to not act criminally). Governmental action here appealed in derogation of these rights facilitate an Apparent Executive Branch Conspiracy to interfere with civil rights, 42 USC 1985.

In light of the pleadings as a whole, see, Pleadings at APP AA, (A344-A384), the EDNY erroneously dismissed Petitioner's civil right allegations as conclusory and unfairly denied discovery and leave to amend. See, APP B, (A45-A59). At least one court has ruled that Whistle blower status itself is sufficient to describe a protected class suffering based invidious discrimination status under Civil Rights Law. Lapin v Taylor, (1979, DC Hawaii) 475 F Supp 446. Congressional pronouncements alone provide a basis for affording military service members civil rights protection, not only when it created whistle blower protection, but with other military status relate laws. See e.g., Soldiers' and Sailors' Civil Relief Act (SSCRA), 50 U.S.C. 501 to 593 (as now modified by the Service Members Civil Relief Act of 2004), Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333. These bodies of law mandate a

Supreme Court finding that Military Service members suffer civil disabilities meriting heightened judicial protection. Congress specifically provided for broad remedial authority for wrongs such as those suffered by Petitioner. See, Military Whistle Blower Act, APP N (A161-A177), and did so in a manner and during a time when such decisions were reviewable under the APA and was therefore intended to be judicially review able. See APA at APP W (A298). (See also part VI below concerning Congressionally mandated judicial review of military personnel decisions)

The Military Whistle Blower Protection Act (MWPA), which DOD has wrongfully failed to implement, gives DOD and Service Secretaries broad authority to deter reprisal and authorize restitution "for the loss of pay, allowances, compensation, emoluments, other pecuniary benefits." See MWPA at APP N (A161-A177). Seeking relief and correct systemic lawlessness, Petitioner sues agency heads in their representative capacity seeking equitable relief available under the Administrative Procedures Act (APA). A military service member may bring an APA action where he seeks "relief other than money damages," in cases "for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704 (2000). See APA at APP W, (A298).

Contrary to the nonreview-able and non-justiciable military label imputed these matters by judicial holding to date, Petitioner's request for equitable relief asks not that Courts involve themselves in matters military; it merely asks that they enforce existing laws and military regulations. It is axiomatic that an agency of the government must scrupulously observe its own rules, regulations, and procedures. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). With respect to the armed forces, this requirement "does not involve any undue interference with the proper and efficient operation of our military forces

because we require only that the [Navy] carry out the procedures and regulations it created itself." Smith v. Resor, 406 F.2d 141, 146 (2d Cir. 1969). For this reason class action status for classes of service members denied access to the rule of law, transparency, and whistleblower protection cannot be said to unfairly burden the military; for this is the very rule of law or liberty which the United States military is constituted to defend. The trial court, therefore, committed reversible error by dismissing petitioner's case and ignoring Petitioner's repeated requests for rulings on class action certification, civil rights and whistleblower protection.

A class-certification decision will "only be overturned if it constitutes an abuse of discretion' Lunquisist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F. 2d 11, 14 [2d Cir. 1993] (per curiam). "However, the failure to follow the proper legal standards in certifying a class... is an abuse of discretion' Blyden v. Mancusi, 186 F .3d 252, 269 [2d Cir. 1999]) . And, our deference is "noticeably less" when a district court "has denied a class status than when it has certified a class." Caridad, 191 F. 3d at 291 (quoting Lundquist, 993 F 2d at 14)." Robinson v Metro North Commuter Railroad, 267 F.3rd 147, 162 [2d Cir. 2001]. The court ignored Petitioner's repeated objections and request for Class Action constitution and Certification. See, Class Action Complaint at Class Act at APP Y (A305-A325).

Petitioner's claims are reviewable under 28 U.S.C. §§ 1331 (Federal Question Jurisdiction). The Administrative Procedure Act determines the standard and scope of review. This Court held in Chappell v. Wallace, 462 U.S. 296 (1983) that decisions regarding the correction of military records are subject to judicial review under the APA "and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell*, 462 U.S. at 303. Case law "casts serious doubt" on an argument that service members' APA claims are never reviewable. Kries v. Sec'y

of the Air Force, 866 F.2d 1508, 1513 (D.C. Cir. 1989). It is, after all, the "function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander." Winters v. United States, 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice 1968).

Treaties are the supreme law of the land. See, U.S. Const., Article 6, cl. 2 (Quoted above). This Court, in The Paquete Habana 175 U.S. 677, 700 (1900), held that international law is part of customary U.S. law and controlling law as U.S. conducts international affairs. See also e.g.,: Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. N.Y. 1980), Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Co. (In re Agent Orange Prod. Liab. Litig.), (E.D.N.Y. Mar. 10, 2005), In re S. African Apartheid Litig., 346 F. Supp. 2d 538, (S.D.N.Y. 2004), Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 155 Oil & Gas Rep. 409 (S.D.N.Y. 2003). The recent Treaty of Rome establishing the International Criminal Court (ICC) is a critical development in the history of human kind. The ICC holds the power to deter aggression by penetrating the sovereign impunity afforded by faux national systems of injustice as illustrated by the case at bar. Under binding Supreme Court precedent above, the ICC represents binding Customary International Law. The executive bad faith and unclean hands of record sadly demonstrates that American Military Service Members require the Supreme Court limit Executive interference with the process implementing customary international law.

When the executive investigative process into reprisal and war crimes is not transparent (or spun from the top down) and complainants are denied judicial review, there are too few alternatives and too few limits upon mans' inhumanity to man. Denied the checks and balance and longer- term perspective provided by judicial review, there can be no

cure for terrorism; war (by other means) has an uncanny way of finding means of indiscriminate (extrajudicial) slaughter of the masses. Without an International Criminal Court, one self-deluded powerful state, can pervert liberty and define complementariness, rationality, judiciousness and humanity, out of existence.

Dismissal of Petitioner's causes of action as non-reviewable and non-justiciable, conflicts with 2d circuit precedent implementing prior Supreme Court decisions on Executive lawlessness. In Harmon v. Brucker, 355 U.S. 579 (1958) (per curiam) the Supreme Court approved substantive Federal Court review of military decisions (discharges). Five years earlier, the Supreme Court ruled that courts-martial proceedings were subject to judicial review. Burns v. Wilson, 346 U.S. 137 (1953). (Court-martial convictions lacked fundamental fairness). The 2d Circuit has applied these Supreme Courts rulings. See e.g. Feliciano v. Laird, 426 F.2d 424 (2d Cir 1970). In Feliciano, the 2d Circuit reversed the EDNY trial court and granted Petitioner soldier's request for a writ of mandamus directing the trial court to issue an order requiring the selective service system to reconsider Petitioner's hardship application because, as in the instant case, the Army failed to follow its own regulations. The 2d Circuit held judicial review of military decisions to be the kind of error that the 2d Circuit would not even hesitate to rectify. Accord, Smith v. Resor, 406 F.2d 141, 145 (2 Cir. 1969); Hammond v. Lenfest, 398 F.2d 705, 715 (2 Cir. 1968); See also Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976). Crawford , illustrates 2d Circuit review of the second type of military decision the 2d Circuit has not hesitated to review, i.e., those involving Fundamental Constitutional rights.

POINT II Where Petitioner reported and threatened to report war crimes, Petitioner was entitled to whistle blower protection and judicial review under the

"preparing" to contact Congress language in 10 USC 1034.

I. Disregard of Whistleblower regulations

DoD agents failed to investigate Petitioner's claim of whistleblower reprisal, as required. APP N (A161-A177), APP S, (A265-274), when he reported Grave Breaches of the Geneva Convention (Whistle) APP E (A64-A81). Instead, DoD agents compiled unauthenticated "summaries" of statements and then used those summaries to deny Petitioner relief. See Investigation at APP F, (A81-A99). In the case of Petitioner's Officer Efficiency Report (OER) appeal, SEE APP G, (A100-A106), the "protection" process which was used as an opportunity to take further reprisal. See, SRB decision at APP H, (107-114). The SRB, instead of reviewing for unfairness selected one of several procedural deficiencies complained of, neglected entirely the unfairness and injustice issues, and made Petitioner's records worse while ruling that reconsideration of non promotion by a Special Selection Board, APP X, (A299-A304) would not make a difference. The decision of the SRB was not followed, as Petitioner's military records endured even further reprisal when the SRB decision was (not) implemented. See, APP BB (A385-A390) for copies of Petitioner's OPR's as "corrected".

Consider the whistle blower investigator's description of the evidence provided by the Inspector General Officer of 2d Armored Division APP F, (A84) of the Investigating officer's report. See Investigation at APP F (A81-99). The investigating officer's "discussion" spins this witness' testimony concerning Cpt Kerian's advice to the Commanding General as being to the effect that petitioner threatened to send the CG 2AD to jail. See, Whistle at APP E (A84) (this is relevant to the "preparing" to contact Congress analysis in part IV & V below) See also at Investigation at APP F (A86). The 14 MP Commander's

statements regarding petitioner's problems with Saudi's are unsubstantiated. In fact, the 14th MP Brigade Commander was not present at the refugee holding areas. The officer taking reprisal, Col Huffman, depicts Petitioner's efforts to comply with the Geneva Convention as a personnel issue, i.e., suggesting that Petitioner caused "management" problems. Moreover, the investigating officer incorrectly suggests that only one conversation took place between the 2AD IG and Petitioner. Again, this conclusion is unsubstantiated by the evidence. See Petitioner's appeal to the ABCMR, APP I (A115-A138, A124,5) for discussion of Petitioner's evidence concerning these contested facts.

The Geneva Conventions are specific, but were not implemented by military superiors. See, GC IV at APP Q, (A179-A256). Petitioner led task forces back and forth across Saudi Arabia, Iraq and Kuwait. Petitioner gathered, found, fixed and signed for 40 Saudi buses that were used to evacuate prisoners from the front. Petitioner established an Arabic/English administrative punishment process so that prison guards would not punish prisoners; so that MPs would not allow maltreatment by interrogators; so that MPs would not allow pictures (also too dangerous to their families) to be taken of prisoners; ensured MPs would treat prisoners humanely; and not punish without due process (all part of judicial record below). Petitioner performed these acts in addition to his Judge Advocate responsibilities because the Geneva Conventions (GC) specifically required these protections. The GC also required that deaths be investigated. GC Art 129, APP Q, (A238).

Department of the Army agents affirmed Petitioner's whistle blower investigation, despite Petitioner specific detailed and corroborated objections to the process' lack of transparency and Petitioner's inability to participate. See , APP I (A115-A138 , and APP E-K generally). Petitioner's Freedom of Information Act and Privacy Act requests for

information were all denied. See additional correspondence at APP Z (A326-A329).

The EDNY trial judge started and ended unfairly. AT the outset the trial court erroneously neglected to mention that Petitioner's must repay his "voluntary" separation pay. APP A, (A2) to receive military retired pay. See, 10 U.S.C. 1175 (e) (3). Similarly, the trial judge erroneously balanced equities in invoking the statute of limitations to deny Petitioner's claims. The Army took 5 years to fail to properly do what Congress required the Army to do in 180 days (A273). Yet Petitioner, facing no such processing requirements is time barred from "correction" by a Correction Board, which even now regularly corrects WWI and WWII historic records. See additional correspondence APP Z, (A329-A343). Showing bad faith and Due Process denial by Army/DoD agents in Correspondence related to the delay, disclosure, supplemental (SRB) reprisal, etc.

The military failed to follow its own regulations. Whistle Blower protection requires an investigation of the wrong alleged to have been reported by the individual alleging whistle blower reprisal. See, DoD Directive 7056.6 **MILITARY WHISTLEBLOWER PROTECTION** dtd Nov 20 1989 at APP S (A265-A274) Responsibilities: (1) The Inspector General, Department of Defense (IG, DoD) shall: [... (b) Initiate a separate investigation of the information the military member believes evidences wrongdoing if such investigation has not already been completed....]

At the end of the flawed (no investigation) "process" the military afforded Petitioner, the Military re-violated its own regulations by failing to properly inform Petitioner of his right to appeal the ABCMR denial of relief to Sec. Def. as required. DoD Directive 7056.6 **MILITARY WHISTLEBLOWER PROTECTION** dtd Nov 20 1989 APP S (A272) Responsibilities: (5) The Secretaries of

Military Departments, or their designees, under 10 U.S.C. 1552 (reference (c)), **shall:**

> **within 180 days of its receipt, issue a final decision on an application for the correction of military records from a military member or former military member alleging reprisal for making or preparing to make (emphasis added) a lawful communication to members of Congress or an IG. When the final decision does not grant the full relief requested by the military member, advise the member that within 90 days he and/or she may request Secretary of Defense to reconsider the decision.**

In violation of law, Petitioner's request for quick resolution was denied and his appeal rights were not communicated. See, 8 Feb 1996 final denial letter from David Kinneer, Executive Secretary, ABCMR. APP K (A155-A158). The ABCMR, in its 8 February 1996 final denial, clearly failed to advise Petitioner of his right to administrative appeal: **"The only remaining avenue of appeal, should you desire to pursue it, would be in federal court."** (emphasis added) APP K (A157). Such military misconduct alone provides an appropriate basis for Federal Court jurisdiction and equitable relief.

II. Disregard of Law of War Program Requirements. The DoD failed to investigate war crimes. DoD Directive 5100.77, **DoD Law of War Program** APP R, (APP A256-A264) states: "Higher authority receiving an initial report **shall: ... "6.3.1. Request formal investigation by the cognizant military investigation authority".** "Formal" as used in this context to modify "investigation" should not be allowed to connote orchestrating secret (largely undisclosed) libel and slander sessions about the person seeking protection and avoiding those with evidence to offer regarding the war crimes (such as the complainant

who specifically expressed a desire to offer additional evidence and witnesses). See Investigation at APP F, (A81-A91) containing only excerpts of unauthenticated (contrived) "summaries" of (often hearsay) testimony. See also "Investigation", APP F, (A95-A99) portraying Petitioner's complaint as against 14th MP Brigade and misstating the law and facts. A "thorough", "formal" investigation would have identified the source of the "refoul and wean" orders and the names of the thirsty refugees who were murdered when they ran towards a late arriving water truck. Rather than investigate Petitioner's underlying complaint (refugee refoulement and murder) the investigation instead focused on maligning Petitioner and white washing the compendium of adverse actions expelling him from the Army.

Petitioner's superior took the position that there was "no intent to occupy" Iraq, so the GC did not apply and there was no problem with "repatriating" (as he called it) and weaning. See Petitioner's initial request for protection (Whistle) at APP E (A64-A81) as corroborated by the Whistle blower investigating officer, through Col Chapman, prior SJA, 2 AD, at Investigation, at APP F (A92-93) (admits it was unknown/undecided whether GC applied). Petitioner's superiors position, clearly disregards long standing U.S. policy to pervasively apply/conform with the Geneva Conventions, see e.g.,:

CHAIRMAN JOINT CHIEF OF STAFF INSTRUCTION, JCSI 5810.01B IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM , 25 March 2002 APP U, (A290-A297) Provides in relevant part:

> **... 3. Applicability: This instruction applies to all personnel of the Armed Forces, including civilians, regardless of assignment or attachment. 4. Policy: a. The Armed Forces of the United States will comply with the law of**

war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations..... [it is the policy of the Department of Defense to ensure that: ....(1) The law of war obligations of the US Government are observed and enforced by the US Armed Forces. (2) An effective program designed to prevent violations of the law of war is implemented by the US Armed Forces. (3) All reportable incidents committed by or against members of (or persons serving with or accompanying) the US Armed Forces are promptly reported, thoroughly investigated (Emphasis added) **and, where appropriate, remedied by corrective action.... b. At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisers will provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.**

Petitioner respectfully submits it is painful to contemplate the incongruity between the non-investigation of Petitioner's allegations and the non release of information Petitioner required to save his career, ABCMR at APP J (A115-A138) and the thoroughness of the investigation (and the release of information) regarding Abu Ghraib to the general public (with no personal Due Process direct need to know). The contemptuous dismissal, lawlessness, lack of transparency and overreaching exhibited by DoD and the Federal Judiciary to date presaged Abu Ghraib. Abu Ghraib, though a human tragedy, and a humiliating disgrace for the U.S., is far less serious than Petitioner's report of

wrongs to the IG, SJA and CG regarding the failure to I.D. process, protect, and the forced refoulement of tens of thousands of refugees, including former allies, to certain death. See Abu Ghraib Investigation (AR 15-6 investigation into the 800th MP Brigade last consulted 12 May 2005) Http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm.

III. Disregard of ABCMR Regulatory Requirements

When Petitioner appealed the reprisal he suffered, the ABCMR perpetuated the Army Special Review Board's (SRB) took further reprisal against Petitioner rather than correcting the Officer Efficiency Report (OER) vindictively labelling him as excessively zealous (untrustworthy). The SRB's "corrective" actions were arbitrary, capricious and an abuse of discretion - making Petitioner's military records worse. See SRB at APP H, (A107-A114). Moreover, the agency itself disregarded the "corrections" that the SRB ordered. See Petitioner's "corrected" military records at APP BB (A385-390). Petitioner's military records (more legible full sized copies in record below if Petition granted) have multiple trashed (filthy largely illegible) copies of his OER stamped VOID on every page (and not other same pages) leaving a reviewer wondering which version is accurate and leaving no unvoided front page to his OER (as opposed to a modified portion of the 2nd page as directed by the SRB at APP H, (A112-A114). Petitioner's records were over-stamped and trashed in a vindictive, unprofessional manner as to constitute constructive termination. (Compare (if writ is granted and the entire record reviewed) with Petitioner's other Army records top block, multiple Meritorious Service Medals, etc. and after he left the Army and joined the Air Force (Appendix to Petitioner's reply brief) which consistently refer to Petitioner as outstanding, extremely brilliant and even "the best Judge Advocate...".

Furthermore, the SRB decision at APP H, (A107-A114) disregards that the OER omitted Petitioner's correct jobs or duties and fails to review for unjustness. As a result, Petitioner's appeal to ABCMR, APP I, (A115-A138) perpetuates SRB unfairness. Where ABCMR failed to substantively review and to correct such unjustness or unfairness, the ABCMR failed to follow its own regulations. See APP T (A274-A278) attached Appendix; Reg AR 15-185, **Army Board for Correction of Military Records**, dtd 29 March 2000, para 1-8 The ABCMR **WILL: "a. Review all applications that are properly before them to determine the existence of error or injustice".** Rather than apply the unfair/unjust standard, the ABCMR improperly required Petitioner to prove that the bad efficiency report was **"the sole basis"** (emphasis added) for his non-promotion. See ABCMR at APP J (A139-A155,)

The ABCMR decision was arbitrary, capricious and an abuse of discretion because Petitioner offered documentary evidence that directly contradicted the summaries (contrived unauthenticated "investigative" statements) adopted by the ABCMR and used to justify their action/inaction. See e.g. APP I (A115-A138) (para 21) where Petitioner provides the ABCMR an offer of proof regarding evidence (directly contrary to the contrived hearsay in the highly informal "summary of witnesses interviews").

Petitioner's appeal of his adverse efficiency report to the Army Special Review Board (SRB) assures Petitioner's non-promotion with admittedly "punitive relief". The SRB acknowledged their punitive result when they found that with the "relief" they provided as part of his military records Petitioner stood no chance of promotion and refused to allow him to be re considered for promotion. See SRB at APP H, (A113). Similarly, the lower Federal Courts have all refused to hear his case contrary to the

Congress intended such decisions to be the judicially review able – See V below.

The ABCMR granted the Whistleblower Investigation and SRB actions a presumption of regularity even though Petitioner's "statement" was allegedly "misplaced": ""Although a copy of telephonic interview between the DAIG investigator and the Applicant is now unavailable...." See ABCMR at APP J (A142,143). The ABCMR's failure to grant Petitioner a hearing while proceeding on an inadequate, inconsistent, and summarized statement is plainly erroneous. To deny Petitioner's repeated requests to participate where key evidence is "missing" (or to even contact the IG Investigator to secure same) is unconscionable. Such a compendium of "omissions" constitutes a criminal conspiracy. See, APP O (A176,7) Conspiracy to impede or injure officer, 18 USC § 372. Despite the ABCMR's statement alleging loss of Petitioner's "summarized" (contrived) statement, same was of record and part of the ABCMR appeal! (This will be shown if petition is granted and a joint appendix assembled).

When clear-cut duty imposed by regulations are not performed, as shown above, Federal Courts will review Military decisions. See e.g. Schlesinger v. Ballard, 419 U.S. 498, 505-10 (1975) (reviewing equal protection challenge of a discharge statute). The irreconcilable and incomplete nature of the evidence made denial of an adjudicative hearing by the ABCMR Arbitrary, abusive and an abuse of discretion; a flagrant failure to follow its own regulations. See Reg AR 15-185, **Army Board for Correction of Military Records**, dtd 29 March 200, para 1-8 The ABCMR **WILL**: "**c. Recommend a hearing when appropriate in the interest of justice.**" (A276).

The ABCMR further abandoned its obligation to independently review records for correctness and injustice

by describing their standard of review as one where they [....**MUST PRESUME** (emphasis added) ....records... not strong enough to merit ...promotion see ABCMR at APP J, (A155). The ABCMR's duties are to review for unfairness and correct injustice. See ABCMR Reg at APP T, (A274-A278)

As part of this process, the ABCMR may start with a presumption of regularity. This presumption is dispelled, however, where the testimony of the witness and complainant is absent from the record and where the Petitioner has specifically contested the truth of unauthenticated, facially inconsistent statements. Additional matter rebutting any presumption of regularity include: 1) An SRB decision which fails to consider the substance (fairness and injustice) of that appeal; 2) considers only a portion of procedural errors; 3) fashions undisclosed admittedly punitive relief; 4) which is not previously disclosed or discussed with the Petitioner; 5) at a proceeding in which he is not allowed to appear and offer additional evidence; 6) and Petitioner's records are not even corrected as directed by the agency. APP BB, (A385-A390).

Given the number of names and statements redacted and withheld the ABCMR process could not have been fair. See, Investigation at APP F, (A88, A89). It appears even the CG's testimony was "summarized" (contrived). Petitioner is unaware if the ABCMR saw this statement or in which form it was reviewed. Petitioner speculates that the ABCMR was somehow able to review an "unsummarized" version of the investigation because his case was delayed for years as the ABCMR attempted to obtain a copy of Petitioner's investigation. See, Correspondence at APP Z, (A332) (indicating ABCMR still had not received Petitioner's records to begin their review in mid Oct 1995). Without discovery, Petitioner is unable to know the "legal" process he was (not) afforded.

IV. 10 USC 1034 protects Military whistle blowers even if merely "preparing" to make protected disclosures. In its review of the Inspector General Whistle Blower reprisal investigation, the ABCMR acknowledges that 10 USC 1034 supposedly protects Military whistle blowers "preparing" protected disclosures. See, Appeal to ABCMR at APP I, (A115-A138). Yet, the Investigating officer denied (and the ABCMR approved) denial of the Petitioner Whistle Blower protection when his own findings validated Petitioner was replaced after stating he was "prepared" to blow the whistle on the Commander, 2 AD, responsible, under non-delegable theory of command responsibility Application of Yamishita, 327 U.S. 1 (1946), for knowing about war crimes within his command. See, Whistle at APP E, (A64-A81).

In his complaint and request for Whistleblower protection APP E, (A64-A81) the Petitioner concedes that he informed the CG of Grave Breach of the Geneva Convention and informed his Judge Advocate superior, who took reprisal, immediately after Petitioner's advice to CG 2AD. Petitioner's original complaint sets forth his belief that his threats or preparations to testify or report wrongs were successful because his suggestions were adopted and 20,000 refugees were processed and returned back to Saudia Arabia from Iraq, making their refugee status verifiable and extending international protections unavailable to mere "internally displaced" (traitors).

The ABCMR approved the whistle blower Investigator's denial of Whistle Blower protection by indulging the pretext that the SJA VII Corps, (officer taking reprisal) who fired Petitioner the next day, and later terminated (in great detail) his career for over zealousness, didn't know about Petitioner's communications with the IG 2 AD. Even if he didn't know of Petitioner's reports to the IG, Petitioner's reports of war crimes to his superior (the officer taking reprisal), and the follow on repression of breaches using

threats of preparing to testify to the CG 2AD, are ABSOLUTELY sufficient to constitute both protected disclosures and "preparing" to make a protected disclosure invoking whistle blower protection. At the time the ABCMR reviewed Petitioner's case, Whistle Blower Protection was expanded far beyond the narrow definition of protected communication applied by the Investigating officer. See APP J, (A139-A155). As a function of correcting unfairness (injustice) the ABCMR should have liberally construed this remedial legislation as Congressionally strengthened due to DoD's past improper failure to implement the obvious Congressional intent behind "preparing" in the first place. At the time of ABCMR review, The Statute provided:

> **No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing -**
> **(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or**
> **(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to -**
> **(i) a Member of Congress;**
> **(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;**
> **(iii)a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or**
> **(iv) any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures**

for such communications. (emphasis added) See 10 USC 1034 at A161-176

Even if Petitioner's communication that superiors were not in compliance with the GC did not meet "preparing to contact Congress" definition, the ABCMR abused its discretion when it failed to accord relief because the statute clearly protects disclosures to IG who reports to the Commanding General Petitioner went to when his complaints to the IG failed to repress the GC violations.

Petitioner has not seen even a contrived "summary" of any statement given by his superior. However, it is clear that the superior officer who took reprisal knew of Petitioner's legal advice to the CG 2AD. Petitioner had earlier told his superior he was going to do this (counsel compliance to his CG 2AD) and his superior made it clear that he did not believe petitioner should do so. In fact, after Petitioner called his superior JA and told him he had done so. Petitioner was immediately "relieved" (fired as SJA 2 AD). The protected communication was characterized, not as legal advice but as excessive zeal and resulted in Petitioner's termination through a virtual cavalcade of adverse personnel actions, including Petitioner's negative OER, the appeal of which led to further reprisal.

Petitioner's Superior who took reprisal, had opined that the Geneva Conventions, APP Q, (A179-A256) did not apply. His confused (albeit career enhancing) legal opinion regarding the Geneva Conventions was corroborated in the statement of the SJA of 2AD Col Chapman, another of his subordinates. ABCMR at APP J, (A93). Petitioner requests the court rule, that as a matter of law, it is unjust and unfair, that the ABCMR failed to "correct", military records reflecting unfavorably upon a mere, Captain, legally, ethically and morally required to truthfully counsel his Commanding General as to his painful preparations to testify truthfully regarding his actions/inactions in order to

repress grave breeches of the Geneva Conventions. APP Q, (A179-A256). Even where, as here the erroneous legal opinions he was forced to disagree with, were those of his superior SJA or the National Command Authority (and legal advisors thereto).

V. The ABCMR disregarded the plain statutory language in 10 USC 1034 which extends protection to those "preparing" to contact Congress: Congress extended Whistle Blower Protection, 10 USC 1034, to those "preparing" to contact Congress. Neither 10 U.S.C.A. § 1034, nor the DoD directive, DOD DIR. 7050.6 defines "preparing". The floor debate over the intent behind the "preparing to make" in the Byrnes Amendment is instructive. The amendment was "to permit any man . . . to sit down and take pencil and paper and write to his Congressman or Senator." 97 CONG. REC. 3775, 3776 (1951). The ABCMR and judicial failure to apply "prepares to make" analysis to Petitioner's facts is reversible error. Congressional intent was to protect one "known" to be preparing to communicate with his or her Congressperson.

The whistle blower investigating officer's report states: Major Talbot 2AD IG stated he was aware through second or third-hand information that Captain Kerian and the Commanding General, 2nd Armored Division (Forward) had words about the Geneva Convention and that Captain Kerian had told the Commanding General that he would go to jail unless he followed Captain Kerian's advice. APP F (A84).

Actually, the Petitioner merely told the CG 2AD that he was prepared to testify truthfully regarding his, the on-sight commander's legal responsibility to assure Geneva Convention compliance. Petitioner said nothing of criminal laws or jail. Petitioner's "preparations" to go to Congress or an IG, are therefore a corroborated matter of record and

the failure by administrative and Judicial fora to date to consider the possibility that Plaintiff is entitled to Whistle Blower protection where he was caught "preparing" to complain to Congress about breaches of the Geneva Convention, is reversible error. Petitioner not only informed his Commanding General that he was prepared to testify that the CG was personally responsible for deaths of protected persons, he informed his Judge Advocate superior (officer taking reprisal) that he had done so, and was immediately relieved. Petitioner fell squarely within the Congressionally defined category of persons entitled to whistle blower protection as one "preparing" to contact Congress. 10 USC 1034, APP N (A161-A177). Petitioner, though fired as SJA 2AD the next day, was gratified the refugees lives were protected by being IDd and (many but not all) moved from Iraq back into Saudia Arabia (some were flown in from other holding areas/refugee camps in Iraq).

VI. Contrary to the District Courts holdings, 10 U.S. C. 36 Sec. 628 (g) specifically provides for judicial review of the military service's refusal to refer a "corrected" Officer Efficiency report to a Special Selection Board for reconsideration. 10 U.S. C. 36 Sec. 628 (g) provides:

> **A court of the United States may review a determination by the Secretary of a military department under subsection (a)(1) or (b)(1) not to convene a special selection board in the case of any person. In any such case, the court may set aside the Secretary's determination only if the court finds the determination to be - (i) arbitrary or capricious; (ii) not based on substantial evidence; (iii) a result of material error of fact or material administrative error; or (iv) otherwise contrary to law. Id at (1) (A)**

The SRB failed to review Petitioner's case for unjustness and unfairness or allow reconsideration by a special selection board of Petitioner's records. The agency did not follow its own rulings and made Petitioner's records even worse than "corrected". APP H (A107-A114). Further, where the EDNY/2d Circuit found Petitioner's complaint to be a non-reviewable military matter, the trial court also disregarded **10 U.S. C. 36 Sec. 628(i)** which provides :

Nothing in this section limits--

(1) the jurisdiction of any court of the United States under any provision of law to determine the validity of any law, regulation, or policy relating to selection boards; or

(2) the authority of the Secretary of a military department to correct a military record under section 1552 of this title.

POINT III: Where Petitioner diligently pursued all of his administrative remedies, where the Military violated its own regulations, and where the Military acted in bad faith in its investigation of Petitioner's allegations of war crimes and reprisal, the lower court committed reversible error when it ruled that Petitioner's challenge of unlawful discharge was barred by the statute of limitations.

The EDNY and 2d Circuit decisions are inconsistent with respect to the Statute of Limitations. The EDNY found that Petitioner's case was not time barred. APP A (A1-A44) in light of Blassingame v. Secretary of Navy 866 F.2d 556 (2d Cir. N.Y. 1989). The second opinion, inexplicably, dismissed all Plaintiff's causes of action. APP B, (A45-A59). The Second Circuit affirmed: "essentially for the reasons stated in its Orders of October 1, 2001 and January 22, 2002,"

Petitioner relied upon Blassingame v. Secretary of Navy, 866 F.2d 556 (2d Cir. N.Y. 1989) for the proposition that the Military and their agents could not violate their own military regulations (much less act in bad faith as in the instant case) and assert the statute of limitations. Because

Blassingame is still the law in the 2d Circuit, the District Court's assertion of a time bar is reversible error. Petitioner urges the Supreme Court adopt the admittedly minority rule of law: i.e., that the statute of limitation begins to run only after proper exhaustion of administrative remedies through military corrections boards, to resolve the current Conflicts between the Circuits on this issue.

The statute of limitations remain equitably tolled because, war crimes were never investigated or if investigated, because same was wrongfully denied Petitioner despite repeated written requests to DoD agencies and officers, to the Secretary of Defense. APP Z. (A326-A343). If such a deprivation comports with Due Process I(it does not) same was at least unjust and correction appropriately mandated.

The Supreme Court has made clear that the Statute of limitations is a shield of equity and subject to waiver, estoppel, and equitable tolling. For instance in analyzing a late EEOC filing and finding same not jurisdictional the court reviewed the structure of Title VII, the congressional policy underlying it, and the reasoning of its earlier cases and found these considerations mandated rejection of a statute of limitations defense. See, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

Such tolling issues are resolved by analysis as to whether or not an equitable exception was generally-recognized at common law at the time of the statute's enactment and whether the equitable exception is incorporated, or foreclosed, by the language of the statute or other indications of legislative intent. With respect to Military Correction Board APP T (A278-A289), Congress APP N (A161-A177) the regulation, as well as the judiciary, Guerrero v. Marsh, 819 F. 2d 238 (9th Cir. 1987) (court can order correction board to decide whether to waive statute of limitations) have all stated the waiver is appropriate in the

interest of justice the law is clearly in favor of waiving the statute in the interest of substantial justice.

If the events surrounding the murder of the Iraqi's who objected to being refouled and weaned into Iraq had been investigated and disclosed as required by law (GC IV, APP Q (A179-A264), and Military Regulations, APP R (A256-A264)), a plethora of evidence would have shown Petitioner's disclosures to be mandated by the GC, protected by binding law; and not career-terminal overzealousness. The post cease-fire occupational events at issue involved the actions of multiple nations of the coalition who together, under cover of United Nations mandate, worked together to frustrate the Geneva Conventions. This is apparently not unusual. See Article: United Nations and The Geneva Conventions, by Roy Gutman. APP N, (A290-A297) (explaining that U.N initiatives frequently disregard Geneva Convention requirements).

Thus, the Petitioner's request for equitable relief at para 65 (APP AA, A383) of his amended complaint, (asking for the protections of an International Criminal Court and that the Supreme Court enjoin future U.S. involvement in United Nations based coalitions and mandates outside the strictures of the Geneva Convention) are necessary to vindicate Constitutionally mandated respect for treaties and customary International Law. The GC affords United States Citizens protection from reprisal and "terror" (indiscriminate war on innocent civilians) an indiscriminate slaughter; it provides military service members' protection from torture and other forms of reprisal against American prisoners of war (and contractors).

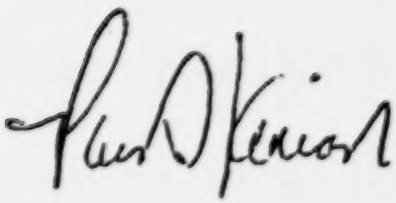
It is long established in this court's jurisprudence that the Statute of limitations is an equitable concept. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 347 (1874). See also 2 H. G. Wood, Limitation of Actions 275, at 1363 (4th ed. 1916) (stating that it is a rule of equity in United States courts

"that where relief is asked on the ground of actual fraud, especially if the fraud has been concealed, that time will not run in favor of the defendant until the discovery of the fraud or until, with reasonable diligence, it might have been discovered").

In the instant case Petitioner, despite numerous FOIA and PA requests, and specific requests to the ABCMR and Secretary of Defense APP Z, (A326A-A384) has not been allowed uncensored versions of his own whistle blower reprisal investigation or any anciliary investigations into the facts at issue and, remains unaware of what evidence was used against him, and any investigations conducted. APP Z, (A326-A343). See Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)). In Holmberg, the Court held that equitable tolling applies where plaintiff has been injured by fraud and remains ignorant of the fraud, "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." Holmberg, 327 U.S. at 397.

CONCLUSION: This Petition for a Writ of Certiorari should be GRANTED.

DATED: June 25, 2005



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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Civil Action No. CV 00-745 (DGT)

MEMORANDUM AND
REVISED ORDER

PAUL D. KERIAN

against –

LOUIS CALDERA, Secretary of the Army, WILLAIM S. COHEN, Secretary of Defense, JANET RENO, United States Attorney General, and TODD D. WEST, Secretary of Veterans Affairs,

Defendants.

----------X

TRAGER, District Judge:

Plaintiff Paul Kerian, a lawyer, brings this pro se action asserting a variety of claims against the former Secretary of the Army, Secretary of Veterans Affairs and U.S. Attorney General. Kerian alleges that the Secretaries of the Army and Defense, by and through their respective departments, Department of the Army (" DA") and Department of Defense ("DOD"), forced Kerian to leave active military service. Kerian appears to allege that his discharge violated the Due Process and Equal Protection guarantees of the Fifth Amendment as well as the Whistleblower Protection Act, Freedom of Information Act, Privacy Act, and Administrative Procedures Act ("APA").

Against the Secretary of Veterans Affairs, Kerian alleges that his agency, the Veterans Administration ("VA") has discriminated against Kerian based upon his status as a disabled person in violation of the Due Process

and Equal Protection guarantees of the Fifth Amendment, Rehabilitation Act and Americans with Disabilities Act. In addition, Kerian claims that the Department of Justice ("DOJ") is preventing him from practicing law in violation of the Due Process and Equal Protection guarantees of the Fifth Amendment. Defendants now move to dismiss all of Kerian's claims.

Background

Kerian served as an Army Judge Advocate General ("JAG") during a period of time which included Operations Desert Storm of the Persian Gulf War. Lekakis Decl., Exh. A (Kerian's Amended Compliant) at ¶¶ 2a, 11, 15. Kerian claims that during the Desert Storm Operation he was forced to participate in war crimes perpetrated by the Army against the Iraqi civilian refugees and prisoners of war. Id. at ¶¶ 2a, 8-11. He reported these "crimes" to his superior Judge Advocate and later to the Inspector General ("IG") and commanding General. Id. at ¶¶ 14, 34.

In 1991 Kerian received an unfavorable Officer Efficiency Report ("OER") from his superior officer and was later denied an end-of-tour award and promotion to Major. Id. at ¶ 15 -16. After denial of the promotion, Kerian chose to leave active military service and avail himself to the Army's Voluntary Separation Incentive, a separation incentive payment for officers who wish to leave active military service. Id. at ¶ 16. Pursuant to participation in this program, Kerian receives an annual payment in the amount of $11,233.89 for 22 years. Lekakis Decl., Exh. B at 11, 293.

However, Kerian believed that he was denied his promotion and other accolades in retaliation for his conversations with the IG, and in November 1991 he filed a whistle blower protection petition along with a request for an investigation of the alleged war

crimes with the DA and the DOD. Id. at ¶ 17. Lekakis Decl., Exh. B at 102-13. Kerian's request was denied, and, in a memorandum dated December 16, 1992, Kerian appealed the denial of whistle blower protection top the Army Board for the Correction of Military Records ("ABCMR") and petitioned for the correction of his military record by removal of the negative portion of the OER at issue. Lekakis Decl., Exh. B at 86-100. claiming that Kerian had not yet appealed the OER and therefore not exhausted all administrative remedies available, the Board responded in a letter dated February 19, 1993 that it would not yet consider his application. Id. at 72-75. The ABMCR also affirmed the decision of the DA and DOD regarding his request for whistle blower protection. Id.

In a memorandum dated November 30, 1993, Kerian administratively appealed the OER in question. Id. at 62-64. On August 23, 1994, a Case Summary was prepared by the Officer Special Review Board ("OSRB") which concluded that the senior rater who had given Kerian an apparently less favorable review had not served in that capacity for the required minimum number of days to be able to rate Kerian. The OSRB decided that the whole portion of the senior rater's comments would be removed and replaced with the statement: "I am unable to evaluate the rated officer because i have not been his senior rater for the required number of days." Id. at 12-13, 29-32, 58. The OSRB further determined that it was not convinced that Kerian would have been promoted had the change been made before Kerian was considered for promotion. Id. at 33, 58.

Kerian continued to believe, however, that the initial decision not to promote him to Major and the decision of the OSRB constituted retaliation for his alleged prior whistle blower activities, and on September 12, 1994 he filed a claim with the IG requesting that an investigation be undertaken to determine the merits of his compliant. Id. at 57. The IG requested that he provide some factual basis

for his allegation that the ORSB board members reprised against him because they would not conduct investigation based purely on Kerian's speculation. Id. at 22-24. Kerian failed to provide this additional information, and in letter dated March 7, 1995, the IG informed him his case had been closed. Id. at 21.

Kerian subsequently re-petitioned the ABCMR for the correction of his military records and re-appealed the denial of whistle blower protection. Lekakis Decl., Exh. A at ¶ 22, Exh. B at 57. included in this re-appeal to the ABCMR was Kerian's request for administrative review of the alleged defective DOD/DA and SIB process and procedure and the "star chamber" nature of the proceedings. Lekakis Decl., Exh. A at ¶ 22. The ABCMR denied relief. Id. at ¶ 24, Lekakis Decl., Exh. B at 1-2. Kerian did not attempt to present any further evidence.

As a result of the time Kerian spent in active military service, he has a service connected skin condition and had been granted by defendant Department of Veteran's Affairs (VA) a 10% disability and the right to receive disability compensation in the amount of approximately $90.00 per month. Lekakis Decl., Exh. A at ¶ 55, Exh. C at 1-2. Kerian was given the option to to receive military pay for the performance of active or inactive duty in lieu of VA benefits while on reserve duty, and he elected to do so. Lekakis Decl., Exh. D at 1.

After Kerian's discharge from the Army, he obtained employment with the United States Department of Justice, Immigration and Naturalization Service ("INS"). See Lekakis Decl., Exh. A at ¶ 62. As part of his responsibilities, Kerian has adjudicated and later supervised others adjudicating application for political asylum. Id. As an employee of the Department of Justice, Kerian is prohibited by DOJ regulations from engaging in any outside practice of law. See 5 C.F.R. § 3801.106.

Discussion

(1) Statue of limitations.

Kerian's first claim for relief challenges the circumstances which led to his participation in the Army's Voluntary Separation Incentive claiming. It appears that he is claiming that he was constructively discharged from the Army. Defendants he moved to dismiss this claim on the ground that it is barred by the statute of limitations. It states, in relevant part:

every civil action commenced against theUnited States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

28 U.S.C.A. § 2401 (West Supp. 2001). It is well settled in the Second Circuit that the statue of limitations on a serviceman's challenge to the terms underlying his discharge from military service begins to run at the time of the discharge. See Boruski v. Unites States Gov't, 493 F. 2d 301, 304 n.5 (2d Cir. 1974); Long v. United States, 616 F. Supp. 1280, 1284 (E.D.N.Y. 1985). Kerian was discharged from the Army on February 25, 1993, see Lekakis Decl., Exh. B at 6, 293 (Certificate of Release or Discharge from Active Duty at § 12b). 1 The period of time in which Kerian could have brought this cause of action therefore expired on Feb. 25, 1999. 2 Kerian, however, did not file his complaint until Feb. 4, 2000, nearly one year after the statue of limitations expired. See Lekakis Decl., Exh. A at 35.

Kerian alleges that the court should toll the statue of limitations for equitable reasons. Id. at ¶ 4. The Second Circuit has recognized that there may be "extraordinary circumstances" in which a part may

not be able to file on a timely basis and equitable tolling there allows "courts to

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[1]Although on a motion to dismiss a district court must limit itself to a consideration of facts alleged on the face of the complaint and any documents attached as exhibits or incorporated by reference, see Goldman v. Belden, 754 F. 2d 1059, 1065-66 (2d Cir. 1985), the Second Circuit has held that a court may consider any documents upon which plaintiff relies in his complaint and which plaintiff had in his possession and relied upon in bringing suit. See Cortec Industries, Inc. v. Sum Holding L.P., 949 F. 2d 42, 48 (1991); Yak v. Bank Brussels Lambert, BBL, No. 00-7821, 2001 WL 589446, at *3 (2d Cir. June 1, 2001) (extending the ruling of Cortec beyond the securities fraud arena). In the present case plaintiff relies on his military personnel file and the Army's Administrative Record on the plaintiff. Those documents are therefore integral to the complaint and will be considered in deciding this motion. See Yak, 2001 WL 589446, at *2.

[2] 28 U.S.C. § 2401 does provide an exception to the six year statue of limitations rule for persons who are under legal disability or beyond the seas at the time the claim accrues. Kerian, however, does not claim to fall into either one of these categories.

extend a statue of limitations on case-by-case basis to prevent inequity." Warren v. Garvin, 219 F. 3d 111, 113 (2d. Cir. 2000); see also Iavorski v. United States Immigration and Naturalization Service, 232 F. 3d 124, 129 (2d. Cir. 2000). These "extraordinary circumstances" have generally been limited to situations "where fraud or concealment of the existence of a claim prevents an individual from timely filing" and only to the point where "the fraud or concealment is, or should have been, discovered by reasonable person in the situation". Iavorski, 232 F. 3d at 134.

In the present case, Kerian does not allege any "fraud or concealment" that prevented him form challenging his discharge from active service in the Army in a timely manner. See Id. at 134 (finding equitable tolling not applicable where there was no fraud and concealment that would preclude plaintiff from filing claim within the statue of limitations). Additionally, Kerian does not claim that there were any extraordinary or unusual circumstances which caused him to file after six-year period had expired. See Mamaradlo v. United States, No. 00-2474, 2001 WL 388069, AT *1 (2D Cir. April 16, 2001) (denying request for equitable tolling even though there were unusual circumstances because they did not rise to the level of "extraordinary" so as to prevent Petitioner from filing petition).

Rather, Kerian alleges that "[g] rave [b] reeches of the Geneva Conventions, and various other exceptions (such as the minority of 'illegitimate' children)" should toll the statue of limitations. Lekakis Decl., Exh. A at ¶ 4. With respect to the grave breeches of the Geneva Conventions during the Persian Gulf War, even if it was assumed that this rose to the level of being an extraordinary or unusual circumstance prevented him from filing his suit on a time by "demostrat[ing] a casual relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing." Hizbullahankhamon v. Walker, No. 00-2493, 2001 WL 672747, at *7 (2d. Cir. June 15, 2001) (quoting Valverde v. Stinson, 224 F. 3d 129, 134 (2d Cir. 2000)). Kerian does not allege that this circumstance "prevented" him from filing on time and has therefore failed to demonstrate that but for this extraordinary circumstance he would have filed within the statue of limitations. See Id. Regarding the minority statue of "illegitimate" children, although Kerian attempts to articulate some claims on behalf of illegitimate children of military personnel, defendants do not

move to dismiss those claims on statue of limitations grounds. Therefore, whether the statue should be tolled due to the infancy of the children is irrelevant.

Kerian's final argument is that equitable tolling of the statue of limitations is mandated because he has not yet been given the relief that he seeks. See Pl.'s Resp. Gov't Mot. Dismiss ("Pl.'s Resp.") at 2. If this were a sufficient basis for equitable tolling, every litigant would be entitled to equitable relief. Clearly, this is not the case.

Even if Kerian had alleged that "fraud or concealment" or extraordinary circumstances prevented him from filing on time, Kerian would still not able to make an argument for equitable tolling because he does not satisfy the requirement that a party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll. See Warren, 219 F. 3d at 113; Iavorski, 232 F. 3d at 1134 (denying plaintiff's request on the basis of equitable tolling because and "it is a common maxim that equity is not intended for those who sleep on their "). The ABCMR informed Kerian of their latest decision not to reconsider his military record in February 1996. See Lekakis Decl., Exh. B at 1-2. He therefore had three years in which to file his claim with this court before the expiration of the statue limitations, yet he did not file his claim until a year after it had expired. Because Kerian has not acted with reasonable diligence during the period he seeks to toll, he cannot now claim equitable tolling of the statue of limitations. Warren, 219 F. 3d at 113-14.

Kerian also argues that the Second Circuit's decision in Blassingame v. Navy, 811 F. 2d 65, 68 (2d Cir. 1987), should govern on which date the statue of limitations begins to run after exhaustion of administrative appeals rather than the date of discharge. See Pl's Resp. at 2. In Blassingame, the plaintiff brought suit in 1984 in federal district court after the Naval Discharge Review Board

("Review Board") and the Board for Correction of Naval Records ("Correction Board") refused to honorable. Plaintiff sought judicial review of the decisions of the Review Board and Correction Board which he claimed were "arbitrarily and capriciously" made. Id. The district court determined that the plaintiff was barred from bringing suit because of the six-year statue of limitations and granted the government's motion for summary judgment. Id.

On appeal the Second Circuit noted the discrepancy that arose between 28 U.S.C § 2401 (a), 10 U.S.C. § 1553 (a) and 10 U.S.C. § 1552 (b) if the six-year statue of limitations was always held to accrue at the time of discharge. See Blassingame, 811 F.2d at 67. Plaintiff had fifteen years from the date of his discharge to petition the Review Board pursuant to 10 U.S.C. § 1553 (a) and an additional three years to appeal the Review Board's decision to the Correction Board pursuant to 10 U.S.C. § 1552 (b). Plaintiff was also required to exhaust his administrative remedies before he could petition the Corrections Board. See 32 C.F.R. §723.3 (c). Accordingly, if the statue of the limitations ran from the time of discharge, plaintiff and others similarly situated would be barred from judicial review any time the Corrections Board rendered its decision more than six years after the discharge date. Given plaintiff's diligent pursuit of all administrative remedies, the Court could find no reason, absent "clear and convincing evidence," that Congress intended to deny, in such obscure manner, judicial review of Board decisions to plaintiff and those similarly situated. See Blassingame, 811 F.2d at 71. The Court therefore held that right to obtain judicial review of a Correction Board decision accrues at the time of the decision. Id. By adopting this rule, the Court would afford all veterans who petitioned the Corrections Board in a timely manner the opportunity to seek judicial review of an adverse decision. See id.

Thus, under Blassingame, although the circumstances surrounding Kerian's participation in the Voluntary Separation Incentive program and his subsequent discharge are beyond review, judicial review may still available for the ABCMR's decision. Kerian was discharged from active military service on Feb. 2, 1993. Lekakis Decl., Exh. B at 6, 293. Kerian petitioned the Officer Special Review Board on November 30, 1993 and later appeal the Board's decision to the ABCMR on September 12, 1994. Id. at 62-64, 57. Both of these actions were taken within the statue of limitations. See 10 U.S.C. § 1553 (a), 1552 (b). Moreover, Kerian filed his compliant on Feb. 4, 2000, less than six years after the ABCMR decision. Kerian is therefore entitled to judicial review of the ABCMR's decision to deny his request for correction of his military records since it is not barred by the statute of limitations to the decision of the ABCMR; plaintiff cannot use Blassingame to circumvent the statute of limitations for directly challenging the discharge itself since the court's review of a Correction Board decision is distinct from its direct review of a veteran' claim of wrongful discharge. See id. at 72-73.

(2) Jurisdiction

Having established that this court is not barred from reviewing the decision of the ABCMR because of the statute of limitations, the court must next determine if there is jurisdiction to hear Kerian's claims. Kerian's first and second claims are against the DA and DOD, executive agencies of the United States. The United States, as sovereign, is generally immune from suit unless it specifically consents to be sued and such consent is unequivocally express. United States v. Mitchell, 445 U.S. 535, 538 (1980). Therefore, this court does not have jurisdiction to review Kerian's claims unless there is both a grant of subject matter jurisdiction and an independent wavier of sovereign immunity. See Ward v. Brown, 22 F. 3d 516, 519 (2d Cir. 1994). Kerian argues that

this court has jurisdiction pursuant to both the Administrative Procedures Act ("APA") and the Tucker Act. The Supreme Court has determined that a service member may challenge a Correction Board's decision in federal trail courts under the APA if he seeks something other than monetary relief. See Clinton v. Goldsmith, 526 U.S. 529, 539 (1999). On the other hand, if monetary relief is requested in addition to the equitable relief sought, the claim may be brought under the Tucker Act or "Little Tucker Act". See id. at 539-40.

A. Administrative Procedures Act

The APA authorizes district court review of an agency decision when a person has suffered a legal wrong because of agency action. 5 U.S.C.A § 702 (West Supp. 2001). The Second Circuit has long since determined, however, that sovereign immunity is waived by the APA only when the complaint seeks equitable relief. See Polanco v. U.S. Drug Enforcement Administration, 158 F.3d 647, 652 (2d Cir, 1998). In an action seeking equitable relief from wrongful agency action, sovereign immunity is not waived where (i) the action also seeks monetary relief; (ii) there is an adequate remedy at law; or (iii) the action is precluded from judicial review by statute or committed by law agency discretion. See id. The types of relief that are specifically barred by the APA include any "injunctive, mandatory or declaratory relief against government officials damages." Presidential Gardens Assocs. V. United States, 175 F. 3d 132. 143 (2d Cir. 1999) (quoting B.K. Instrument, Inc. v. United States, 715 F.2d 713, 727 (2d Cir. 1983)).

Kerian's claims include not only the equitable claims for review of his military record and reinstatement to his former position but also a request for back pay. See Lekakis Decl., Exh. A at ¶ 2j. Back pay, as a claim for money damages, falls outside the scope of the APA so Kerian may rely on the APA as a basis for jurisdiction only to the extent that he seeks declaratory and injunctive relief. Ward, 22

F.3d at 520. Therefore, this court does have the authority under the APA to review the agency decision of the ABCMR though only equitable relief may be granted. See Clinton, 526 U.S. at 539. To determine if Kerian is entitled to recover back pay, the court must determine if his claim can be brought under the Tucker Act.

b. Tucker Act

It would seem that, because the statue of limitations has passed on Kerian's initial discharge claims, see supra, this court does not have the authority to grant any of Kerian's request for monetary relief. However, this issue is not well settled in the Second Circuit. The court in Blassingame only contemplated the issue on monetary relief under the Tucker Act and did not actually have make a determination because the plaintiff had expressly relinquished any claim for monetary relief. See Blassingame, 811 F.2d at 69.

Even if it were assumed that Kerian's claim related to the ABCMR decision could be reviews under the Tucker Act, the plaintiff does not have a basis on which to establish subject matter jurisdiction The Tucker Act grants original jurisdiction to the Claims Court to decide claims against the Unite States founded upon either the Constitution, a federal statue, or any regulation of an executive department. 28 U.S.C.A. § 1491 (a) (1) (West Supp. 2001). The "little" Tucker Act grants concurrent jurisdiction to the district courts for any of these same claims not exceeding $10,000 in amount.[3] 28 U.S.C.A. § 1346 (a) (2).

The Tucker Act provides a limited waiver of sovereign immunity for servicemen and servicewomen alleging wrongful discharge from military. See Janniers v. United States Army, 34 F. Supp. 2d 850, 854 (E.D.N.Y. 1999). Unlike the APA, the Tucker Act can, in appropriate military back pay cases, "provide

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[3] In his First Amended Complaint, Kerian asks for monetary relief ion the form of back pay but does not specify a dollar amount. If Kerian were to be awarded the full amount of the back pay for which he claims to be entitled, that amount will exceed the $10,000 limit. See Mem. Law Supp. Def. Mot. Dismiss at 12-13. As the complaint stands now, the government's argument that this court does not have jurisdiction over Kerian's claim under the Tucker Act is correct. His complaint would to be brought in the Court of Claims pursuant to 28 U.S.C. § 1491. However, in his Response to Government's Motion to Dismiss, Kerian alleges that $10,000 to ensure the jurisdiction of this court. See Pl.'s Resp. at 4. There is no reason why this court shouldn't allow Kerian the opportunity to amend his complaint to demand no more than $10,000 which would bring his action into the jurisdiction of the district court. See Brewster v. Secretary of the United States Army, 489 F. Supp. 85, 88n.1 (E.D.N.Y. 1980).

an entire remedy," including back pay, restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491 (a) (2), 1346 (a) (2); See Clinton v. Goldsmith, 526 U.S. 529, 539-40 (1999) (citing with approval Mitchell v. United States, 930 F. 2d 893, 896 (Fed. Cir. 1991)). Thus, Kerian can establish a wavier under the Tucker Act.

The issue of sovereign immunity and subject matter jurisdiction are, nonetheless, wholly distinct and a showing of a waiver immunity does not guarantee that the suit can proceed without a showing of subject matter jurisdiction. See Presidential Gardens Assocs. v. United States of America, 175 F. 3d 132, 138 (2d Cir. 1999). A court must dismiss an action "whenever it appears...that the court lacks jurisdiction of the subject matter." Id; see Merritt v. Shuttle Inc., 187 F. 3d. 263, 268 (2d Cir. 1999) (declining to reach the substance of an order from the lower court

"without first carrying out our 'special obligation to satisfy [ourselves] not only of [our] own jurisdiction, but also that of the lower courts in [the] cause under review,'" (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 95 (1998))).

The Tucker Act provides a waiver of sovereign immunity to allow jurisdiction over all claims (1) founded on a express or implied contract with the United States; (2) fro a refund from a prior payment made to the government; or (3) based on federal constitutional, statutory, or regulatory law but is itself only a jurisdictional statute. See United States v. Testan, 424 U.S. 392, 400 (1976). It "does not create any substantive right enforceable against the United States for money damages." Id. at 398-99. Therefore, I order for this court to have jurisdiction over Kerian's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. See Osborn v. United States, 47 Fed. Cl. 224, 228 (2000).

When a contract with the United States is not involved, to invoke jurisdiction under the Tucker Act, the plaintiff must identify a constitutional provision, a statute, or a regulation that provides a substantive right to money damages. United States v. Tippett, 185 F. 3d 1250, 1254-55 (Fed. Cir. 1999). For claims founded on a statute or regulation to be successful, the provisions relied upon "must contain language which could fairly be interpreted as mandating recovery of compensation from the government." Testan, 424 U.S. at 400. Kerian asserts that this court has subject matter jurisdiction to hear this case pursuant to the Military Whistleblower Protection Act, the Privacy Act, and 37 U.S.C. § 204.

1. Military Whistleblower Protection Act

Under the Military Whistleblower Protection Act, no person may take unfavorable personnel action against a member of the military because he has made a communication with an Inspector General. 10 U.S.C.A. § 1034 (West Supp. 2001). Kerian claims that the Army violated this statute when they denied him promotion to Major because they did do in retaliation for his having communicated to the IG the war crimes allegedly committed by members of the Army.

Section 1034 does not establish the jurisdiction of this court over Kerian's claim because it provides solely an administrative process for handling complaints of improper retaliatory personnel actions and does not provide Kerian with any private cause of action. See Acquisto v. United States, 70 F. 3d 1010, 1001 (8th Cir. 1995) (remanding case to district court with directions to dismiss for lack of subject matter jurisdiction); Soken v. United States, 47 Fed. Cl. 430, 433 (2000); Tureman v. Lekberg, No. CIV.A. 97-1018, 1998 WL 181816 at *2 n.6. (E.D. Pa. April 16, 1998) ("Section 1034 confers an administrative remedy with a six-month statute of limitations, and creates no private right of action.") (citations omitted). Therefore, Kerian cannot rely on the Whistle Blower Protection Act to provide subject matter jurisdiction.

2. Privacy Act

Kerian also maintains that the Privacy Act provides this court with subject matter jurisdiction. Lekakis Decl., Exh. A at ¶ 3; Pl.'s Relay at 5; see 5 U.S.C.A. § 552a (West Supp. 2001). Congress enacted the Privacy Act to "'provide certain safeguards for an individual against an invasion of personal privacy,' by requiring governmental agencies to maintain accurate records and providing individuals with more control over gathering dissemination, and accuracy of agency information about themselves." Devine v. United States, 202 F. 3d 547, 550 (2d Cir. 2000).

Under the Act, an agency is precluded from disclosing information in its file to any person or the another agency without prior written consent of the individual to whom the information pertains. See Id.

Unlike the Military Whistleblower Protection Act, the Privacy Act does provide Kerian with private right action. 5 U.S.C.A. § 552a (g) (1) (D). However, Privacy Act claims are subject to a two year statute of limitations. 5 U.S.C.A. § 552a (g) (5). Failure to file within the statute of limitations is jurisdictional, thus an untimely complaint deprives the district court of subject matter jurisdiction. See Akutowicz v. United States, 859 F. 2d 1122, 1126 (1988) (affirming the dismissal of plaintiff's Privacy Act claim because the two year statute of limitations had passed).

For Privacy Act claims, the statute of limitations begins to accrue either from the date on which the cause of action arises or, if an agency has materially or willfully misrepresented any information that is required to be disclosed, from the date on which the individual discovers the misrepresentation. 5 U.S.C.A. § 552a (g) (5) . The government argues that Kerian's Privacy Act claim should be dismissed because the latest actions that any of the defendants took that are the subject of Kerian's first and second claims for relief occurred in 1996. See Reply Me. Law Supp. Def's Mot. Dismiss at 7.

Although Kerian does not specify in his complaint the date of the information that he requested pursuant to the Privacy Act, it appears from the context of the complaint that the request was made prior to 1996. See Lekakis Decl., Exh. A at ¶ 23. Kerian states that he appealed the Special Inquiry Board's unfavorable "remedy" to the ABCMR on September 12, 1998. See Lekakis Decl., Exh. A at ¶ 24, Exh. B at 1-2. Given the context of the complaint, we can infer that the

"Agency" referred to is the ABCMR and that the request for information was made some time prior to that agency's denial of relief.

Accordingly, the cause of action giving rise to Kerian's Privacy Act claim must have occurred some time before February 8, 1996 which would allow Kerian until February 8, 1998 at the latest to file Privacy Act claim. Kerian, however, did not file his initial complaint until February 4, 2000, almost two years after the statue of limitations had expired. See Lekakis Decl. Exh. A at 35. The Privacy Ac, therefore, does not provide Kerian with jurisdiction for his first and second claims for relief because these causes of action are time-barred. See Akutowicz, 859 F. 2d at 1126; see also Davis v. United States Department of Justice, 204 F. 3d 723, 726 (7th Cir. 2000) (Privacy Act claim dismissed for failure to bring within two-year statute of limitations because "where the government's consent as sovereign to be sued is conditional upon filing of suit within a specified period of time, strict compliance with that condition is jurisdictional prerequisite."); Trueman v. United States Department of Navy, No. 97-1877, 1997 WL 734154 (8th Cir. Nov. 26, 1997).

3. 37 U.S.C. § 204

Kerian also cities the military pay statute as a basis for district court jurisdiction. Lekakis Decl. Exh. A at ¶ 3. Although the government does not address jurisdiction under 37 U.S.C § 204 in their motion to dismiss, we will consider it here. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("Subject-matter delineations must be policed by the courts on their own initiative...because it is nonwaivable and delimits federal-court power.").

For military pay cases contesting the nature of discharge from branch of the armed forces, 37 U.S.C § 204 is a money-mandating statute providing jurisdiction

under the Tucker Act. See Osborn v. United States, 47 Fed. Cl. 224, 229 (2000). Section 204 entitles a member of a uniformed service who is on active duty to basic pay. 37 U.S.C § 204 (West Supp. 2001); see Osborn v. United States, 47 Fed. Cl. 224, 229 ("37 U.S.C § 204 ...confers on an officer the right to the pay of the rank he was appointed to until he was properly separated from the service.")

However, federal courts do not have jurisdiction under section 204 if a plaintiff's retirement from the military is voluntary. Sammt v. United States, 780, F. 2d 31, 32 (Fed. Cir. 1985). For purposes of jurisdiction, a military resignation is presumed to be voluntary. Osborn, 47 Fed. Cl. At 230. For a plaintiff to rebut this presumption, he must show that he could not exercise free choice in the decision to separate from the military or his decision was a result or duress, coercion, misrepresentation , or mental incompetence. Id. On the other hand, if a serviceman or woman is selected fro early retirement under 10 U.S.C. 638 and 638a because of non-promotion, the fact that he elects to leave at an earlier date does not make his retirement voluntary. Adkins v. United States, 68 F. 3d 1317, 1321 (Fed. Cir. 1995).

In the present case, Kerian does not allege that he was going to be mandatorily retired from active service in the Army subsequent to his non-selection fro promotion and pursuant to 10 U.S.C. § 638 or 638a. Furthermore, Kerian has not alleged that there is any evidence to rebut the presumption that he voluntarily retired by showing that the elements of duress, time-pressure, misrepresentation, or mental incompetence were present at the time of his separation; and the facts in his complaint do not support such an inference. Since Kerian cannot overcome the presumption that his separation was voluntary, 37 U.S.C § 204 is not an appropriate money mandating statute on which Kerian can base his first and second claims for relief. See Osborn, 47 Fed. Cl. At 231.

For the reason stated above, neither the Military Whistleblower Protection Act, the Privacy Act, nor 37 U.S.C § 204 provide this court with jurisdiction over Kerian's money claims, so review of his first and second claims under the Tucker is not applicable. The court does not have jurisdiction to award Kerian back pay any form of monetary damages and may therefore only considered Kerian's request for equitable relief pursuant to APA. See supra p. 8-9.

If a plaintiff challenges performance evaluations and promotions within the framework of the intramilitary administrative procedure and his claims are denied without a hearing, he may then seek judicial review. Chappell v. Wallace, 462 U.S. 296, 303 (1983). The relevant standard of review set forth in the APA, 5 U.S.C. § 706, is that a reviewing court shall not set aside an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706 (2) (A) (West Supp. 2001). For the court to make this determination "[it] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment ." Blassingame v. Secretary of the Navy, 811 F. 2d 65, 72 (2d Cir. 1987) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402,416 (1971)).

The problem for Kerian, however, is that his complaint simply does not contain any factual allegations in this regard. While the complaint does allege that the ABCMR acted arbitrarily in refusing to review his claims that the military was violating military law, [4] he fails to included any similar allegations with respect to whatever review the ABCMR conducted of his voluntary discharge. See Lekakis Decl., Exh. A ¶¶ 19, 20, 22. Accordingly, he does not provide allegations from which it can be inferred that the decision of the ABCMR relative to his discharge was arbitrary, capricious, an abuse of discretion or

contrary to law. Consequently, the defendants' motion to dismiss Kerian's APA challenge to the decision of the ABCMR relative to his discharge is granted. Kerian has leave to amend, however, if he has a basis for alleging that the decision of the ABCMR was arbitrary or capricious. Consistent with this opinion, any future complaint must be limited to the decision of the ABCMR relative to his discharge, and the relief requested can only be equitable.

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[4] These allegation are addressed infra, part (5).

(3) Title VII of the 1964 Civil Rights Act

In the first and second claims for relief, Kerian alleges that the government retailed against him for whistle blowing activities after he communicated with the Inspector General about the war crimes he allegedly witnessed during the time of the Persian Gulf War, and that, as a result, he was punished by being denied a promotion and end-of-tour award. Lekakis Decl., Exh. A at ¶¶ 44-45, 52-53 . Although Kerian does not specifically cite to violations of the Title VII in his complaint, he does argue in his Response that his action's against his superior officers, including the communications with the Inspector General, fall under Title VII's protection from employment discrimination and retaliation. See Pl.'s Resp. at 3. Although Kerian is acting pro se, he is a lawyer, and ought not be entitled to any special consideration. Nonetheless, even is these allegations were treated as properly pleaded, they lack merit.

Under 42 U.S.C. § 2000e-3 an employer may not discriminate against an employee who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." To establish a prima facie case fro retaliation, a plaintiff must demonstrate "participation in protected activity known to the defendant, an employment action

disadvantaging the person engaged in the protected activity, and a casual connection between the protected activity and the adverse employment action." Cruz v. Coach Stores, Inc., 202 F. 3D 560, 566)2D. Cir. 2000). Kerian argues that his action—demanding and exacting compliance with the rule of law—should be construed as activity protected under Title VII. See Pl.'s Reply at 3. Such a construction, however, would be contrary to the meaning of Title VII, which is intended to prevent employment discrimination based on race, color, religion, sex, or national origin. See 42 U.S.C.A. § 2000e-2 (West Supp. 2001). The term "protected activity" refers to "action taken to protest or oppose statutorily prohibited discrimination." Cruz, 202 F. 3d at 556. Clearly, Kerian's claims do not fall within the meaning of Title VII's protected activity, since Kerian makes no allegations that the Army either discriminated against him or retaliated against him for opposing discriminatory employment practices set forth in section 2000e-2.

Even if Kerian could show that he engaged in "protected activity" within the meaning of the statute, he still cannot assert a Title VII retaliation claim because it is a claim that arose from his employment as an active duty Judge Advocate I the U.S. Army, and Title VII does not apply to uniformed members of the armed forces. Spain v. Ball, 928 F.2d 61, 62 (2d Cir. 1991); Roper v. Department of the Army, 832 F.2d 247, 248 92d Cir. 1987) (finding that employment in the military differs materially from civilian employment and there is a need to defer to the military in matters involving hierarchy and structure of command); Janniere v. United States Army, 34 F. Supp. 2d 850, 853 (E.D.N.Y.) ; Cedano v. United States Gov't, No. CV-86-2223, 1989 WL 23901, at *1 (E.D.N.Y. March 13, 1989) (dismissing Air Force veteran's employment discrimination claims because 42 U.S.C. § 2000e-16 is "the exclusive judicial remedy for claims of discrimination in federal employment" and it doe not apply to uniformed members of the armed services). The Second Circuit explained in Roper

that, although "Title VII was designed to protect from discrimination 'employees or applicants for employment...in military departments...'. 'military department'...include[s] only civilian employees...not establish a Title VII claim of retaliation.

(4) Constitutional and Tort Claims Against DOD and DA

In his first and second claims for relief, Kerian also alleges constitutional and tort claims against the United States military. The first court alleges that, while Kerian was a member of the Army's JAG Corps. Defendants Army and DOD committed tort against Kerian by forcing him to participate in war crimes causing him "to suffer financial and emotional harm and severe humiliation and embarrassment." Lekakis Decl., Exh. A at ¶¶ 44-49. In the second court of his Amended Complaint, Kerian alleges that he suffered injury as a result of the administrative remedy process made available to him which he claims violated the Equal Protection and Due Process clauses of the U.S. Constitution.

The Supreme Court has repeatedly held that constitutional claims of military personnel arising out of activities incident to their military service are generally not reviewable by civilian courts. Feres v. United States, 340 U.S. 135 (1950); Chappell v. Wallace, 462 U.S. 296 (1983). In Feres, the Court first looked at the Federal Tort Claims Act as it applied to three separate plaintiffs who had brought suit to recover fro injuries they had sustained while on active duty as a result of the negligence of other in the armed forces. Id. 138. Looking at the history of the Act, the Court determined that Congress did not intend to create any new cause of action. Since the Court knew of no previous law which ever permitted a soldier to recover for negligence against either his superior officers or the Government, it concluded that "the Government was not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are

in the course of activity incident to service." Id. at 146.

In Chappell, the Court expanded the Feres ruling to preclude an enlisted serviceman from maintaining a suit against a superior officer fro any constitutional violations since Congress, the constitutionally authorized source of authority over the military system of justice, had not provided a damages remedy for military personnel claiming that their constitutional rights had been violated by superior officers. Chappell, 462 U.S. at 304. The Court reasoned that providing such a remedy by way of a judicial response would be in inconsistent with Congress' authority in this field. See id.

The Court was particularly concerned with the consequences of a disruption to the relationship between a soldier and his superiors if the soldier were allowed to hale his superiors into court, noting that '[t]he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." Id. ; see also United States v. Stanley, 483 U.S. 669, 683 (1987) (affirming Chappell reasoning that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field" counsel judicial abstention) (citation omitted).

The Second Circuit has also followed the Feres and Chappell doctrines barring military service persons from bringing constitutional claims against their superior officers. See Baldwin v. United States Army, 223 F.3d 100, 101 (2d Cir. 2000) (extending bar on uniformed members of the armed forces from bringing Title VII and ADEA claims to also included ADA claims) ; Jones v. New York State Division of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999) (noting that the judiciary

should hesitate to review decisions of the military because the Constitution gives primary control of the military to the executive and legislative branches).

Kerian argues that Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) is the applicable precedent governing the present case. Kerian's argument is incorrect for two reasons. First, the plaintiff ion Crawford brought a suit challenging the constitutionality of the regulation under which she was discharged after being forced out of the Marine Corps when she became pregnant. Id. at 1116. Here, in contrast, Kerian's claims revolve around the individual injury he suffered as a result of his forced participation in war crimes. Challenges to such individual tort or constitutional claims are proscribed by the authority described above. Second, Crawford was decided prior to the Supreme Court's Chappell ruling. Therefore, even assuming there was some tension between the decisions, the rule set forth in Chappell controls. Consequently, Kerian's constitutional and tort claims are dismissed because Kerian is barred from bringing such claims against his superior officers. See Chappell, 462 U.S. at 304.

(5) Justiciability

a. Military administrative review process

Kerian also challenges to the processes by which defendants Army and DOD conduct military affairs. In his second claim for relief Kerian challenges the constitutionality of the administrative legal processes made available to him claiming he was deprived of Fifth ADMENT Due Process. Lekakis Decl., Exh. A at ¶ 51. Specifically, Kerian challenges the "star chamber" nature of the proceedings.[5] Pl.'s Reply at 6.

In drafting the Constitution, the Framers anticipated that there would be issues regarding the military such as those raised in this case. In response, they

explicitly granted plenary authority to Congress "To raise and support Armies"; "To provide and maintain a Navy", and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 12-14, see Chappell, 462 U.S. at 301. Clearly, the Constitution contemplates that the Legislative Branch would have plenary control over rights, duties and responsibilities in the framework of the military establishment including regulations, procedures and remedies related to military discipline. See id.

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[5] We assume that Kerian's references to the "star chamber" is a references to the English court with that name during the 14th to 17th centuries. Finding its support from the king's prerogative (sovereign power and privilege), the Court of Star Chambers was not bound by the common law and eventually came to be a symbol of oppression because of its corrupt procedures, oppressive methods, and arbitrary punishments. Encyclopedia Britannica , <http://www.Britannica.com/eb/article>.

Chief. U.S. Const. Art. II, § 2. The Court, on the other hand, is assigned non constitutional responsibility for supervision of military decisions. For that reason judicial deference's in the military context "is greater than [in] any other area." Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989) (quoting Chappell, 462 U.S. at 301).

Furthermore, it is presumed that judges do not have the requisite competence to make decisions about internal military affairs. As the Court stated in Gilligan v. Morgan,

[I] t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military

judgments, subject always to civilian control of the Legislative and Executive Branches.

413 U.S. 1, 10 (1973). For this reason the Constitution has vested the responsibility for control over the military in the Executive and Legislative branches of government since they are periodically subject to electoral accountability. See id. at 10. It is Congress and the President to determine how the Armed Forces shall best execute the business of fighting and preparing to fight in wars. See Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

Congress and the courts have acted in conformity with that view as a defense to legislative and executive judgments in the are of military affairs is evident in several Supreme Court decisions. In Orloff v Willoughby, 345 U.S. 83, 93-94 (1953), the court noted that

Judges are not given the task of running the Army. The responsibility for setting up channels through which...grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates...Orderly government requires that the judiciary be...scrupulous not to interfere with legitimate Army matters.

In Parker v. Levy, 417 U.S 733, 756 (1974), the Court rejected both vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice, noting that "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society. In Schlesinger v. Ballard, 419 U.S. 498, 510, the court held that Congress did not violate the Due Process Clause of the Fifth Amendment by enacting military regulations that treat men and women differently when they are discharged from service. Finally, in Rostker v. Goldberg, 101 S. Ct. 2646, 2653 (1981), the Court noted that, when deciding the question of whether the required

registration of men, and not women, under the Military Selective Service Act violated Due Process, "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence fro a reasonable evaluation by the Legislative Branch."

Still, Congress is not free to disregard the Constitution when it acts in the area of military affairs. For example, though the court's review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society, this does not mean that servicemen and servicewomen are excluded from protection by the First Amendment. See Goldman v. Weinberger, 475 U.S. 503, 507 (1986). But any decision that entails a matter provided for by Congress in the exercise of its power is to be treated as presumptively valid and any doubt as to its constitutionality should be resolved in favor of deference of the military's exercise of its discretion so long as it is "reasonably relevant and necessary to furtherance of our national defense." Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985); see Mack v. Rumsfeld, 784 F.2d 438, 439 (2d Cir. 1986) (reaffirming Katcoff).

To the extent that Kerian claims in his second claim for relief that the administrative process made available to him after his discharge violates the Fifth Amendment, the Supreme Court had already determined that the forum provided by the ABCMR comports with Due Process. See Chappell, 462 U.S. at 302-03. The court found the procedures provided by the ABCMR sufficient as the remedy Congress has chosen to provide for the review and remedy of complaints and grievances, particularly since, under the APA, they are ultimately subject to judicial review and may be set aside if they are arbitrary, capricious, or not supported by substantial evidence. Id. Kerian was provided with the opportunity to challenge his non-promotion

within the framework of this intramilitary administrative procedure and he took advantage of that opportunity. There is no reason for this court to think that the process by which Kerian brought his challenge does not comport with the Fifth Amendment due process of the law. Therefore, those claims should be dismissed.

In his fourth claim relief, Kerian alleges that defendant DOD inappropriately rejected, and later implemented some or all of his suggestions regarding the treatment and care of illegitimate children of service members without giving him credit or the appropriate compensation for the suggestions. See Lekakis Decl., Exh. A at ¶ 60. After considering this allegation in light of the standard for reviewability promulgated by the Supreme Court and the Second Circuit, the claim must also be dismissed. The presence and care of illegitimate children may have an effect on military defense efforts and any policy determination on that basis is reasonably related to furtherance of national defense. See id.[6]

b. Army foreign policy

In addition in his fourth claim for relief, Kerian makes several blanket statements about the DOD and DA's "failure to

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[6] For some inexplicable reason, the defendants have not raised the plaintiff's lack of standing to assert his fourth claim on behalf of illegitimate children of servicemen. His claim for compensation for raising these issues, like all of his arguments related to his time of service, is time-barred.

adhere to fundamental international law." Lekakis Decl., Exh. A at ¶ 59. It is unclear from his Amended Complaint what law or laws Kerian believes these

agencies to have violated[7]. Here merely accuses the agencies of neglecting "helpless 'illegitimate' children, of service persons," engaging in "criminally irresponsible conduct" and advancing the "criminal" and conspiratorial polic[ies] and programs of [their] officers." Lekakis Decl., Exh. A at ¶ 59. It is unclear what the legal basis is for Kerian's complaint in this regard; however, it is not necessary that the court try to make this determination since it is clear that Kerian's claims call within political question doctrine and are therefore non-justiciable claims.

The political question doctrine, which is "primarily a function of the separation of powers" as it addresses the "relationship between the judiciary and coordinate branches of the Federal Government," requires the court to dismiss as nonjusticiable cases concerning matter which have in any measure been committed by Constitution to another branch of government and where that branch has not exceeded whatever authority has been committed. Baker v. Carr, 369 U.S. 186, 210-11 (1962). In Baker, the Court identified six factors that may render as issue as a nonjusticiable political question: (1) a

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[7] In his prayer for relief, Kerian does request that DOD employees be enjoined from opposing the adoption to the Treaty of Rome and the International Criminal Court Statute but it is unclear how, if at all, these laws pertain to the DOD's position with regard to the illegitimate children of service persons.

textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards fro resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a

court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncement by various departments on one question. Id.

The Court had long since recognized that foreign policy is the province and responsibility of the Executive and Legislature. See Chicago & S. Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); see also Department of the Navy v. Egan, 484 U.S. 518, 529 (1988). In Chicago & Southern Airlines the Supreme Court declared that:

the very nature of executive decisions as to foreign policy is political, not judicial. Such decision are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.... They are decisions a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held in the domain of political power not subject to judicial intrusion or inquiry.

843 F.2d at 111. For this reason, courts are traditionally reluctant to intrude upon the authority of the executive in military affairs. See id. at 530. Questions touching the military and foreign relations are generally treated as political questions since they may not only frequently require standards that defy judicial application but they involve the exercise of a discretion demonstrably committed to the executive as well as legislative branch of government's views. Baker, 369 U.S. at 211.

In Greenham Women Against Cruise Missiles v. Regan, 755 F.2d 34 (2d Cir. 1985), the Second Circuit affirmed the lower court's dismissal of a complaint

challenging the decisions of the executive branch regarding the deployment of cruise missiles. Although the court was in agreement with the lower court's analysis that decisions regarding the deployment of cruise missiles cannot be resolved by courts because of the lack of judicially discoverable and manageable standards, they "believe[d] it even clearer that the complaint of the non-congressional plaintiffs raises issues which have been committed by the Constitution to coordinate political departments and requests relief which cannot be granted absent an initial policy determination of a kind clearly for nonjudicial discretion." Id. at 37 (internal citations omitted) ; see also DaCosta v. Laird , 471 F. 2D 1146, 1147 (2D Cir. 1973) (dismissal of complaint because question of whether Secretaries of Defense, Army, Navy and Air Force and Commander of American Military Forces may follow the laws and directives set forth by the President was nonjusticiable political question outside the power of the court to review).

Kerian's claims concerning the policy and programs of the DOD and DA with regard to their treatment of the illegitimate children of U.S. service persons are not justiciable because they raise purely political questions for which thee is no judicial remedy. See Eveland v. Director of CIA, 843 F.2d 46, 46 (1st Cir. 1988). Again, Kerian is clearly trying to litigate, not some personal injury, but his disagreement with how the executive and military manage this country's foreign policy. See id.

Finally, Kerian is not content with just asking this court to intervene on behalf of helpless illegitimate children throughout the world In his prayer for relief he also includes a rather lengthy laundry list of additional requests for judicial intervention in military affairs. (1) judicial order enjoining future U.S. military action in UN Chapter VII peace enforcement if the U.S. fails to comply with the Geneva Conventions; (2) judicial mandate compelling remedial international treaty compliance by U.S.

executive branch agencies involved in the Persian Gulf operation; (3) mandate to the Attorney General for the appointment of an Independent Counsel to investigate military war crimes;. (4) injunction restraining DOD from spending public funds or lobbying in opposition to the adoption of the Treaty of Rome and the International Criminal Court Statute or undercutting treaty obligations of the U.S.; (5) judicial mandate or declaratory judgment for the protection of service members' right to protect their fundamental humanity by allowing knowing participation in the war fighting process; (6) judicial mandate or declaratory judgment that members of the military be allowed to communicate with "those would they would kill"; (7) judicial mandate or declaratory judgment protecting service persons right to provide the "enemy" with information to help them decide whether or not to surrender and right to "allow the 'enemy' to manifest an intent to surrender before they kill them; and (8) judicial mandate entitling U.S. service persons access to sufficient information so they can assess the necessity and proportionality of response consistent with international law.

It is unclear how any of these prayers for relief relate to any of Kerian's causes of action against the DOD and DA and it is, therefore, questionable whether Kerian has the proper standing to make any of these requests for relief. Regardless, all of the requests mentioned above are directly related to foreign relations and fall squarely within the province of the other two branches of government. It is not within the authority of this court to superintend the manner and methods by which executive branch agencies charged with control over the military and U.S. activities abroad fulfill their responsibilities.

(6) Claims Against Defendant Veteran's Administration

In his Third Claim for relief, Kerian challenges the military regulation under which his

military pay is, and will be, reduced. Kerian alleges that his military separation pay and his military reserve pay (Kerian is a member of the military reserve) has been reduced by the amount of the VA disability pay and that when he retires, the reserve military retire pay that he will receive will also be reduced by the amount of his disability pay. Lekakis Decl., Exh. A at ¶ 56. Kerian claims that this three-time reduction of his disability constitutes a violation of the Rehabilitation Act, American with Disabilities Act and the Due Process and Equal Protection Clause of the Fifth Amendment since he is being discriminated against based on his status as a disabled veteran. Lekakis Decl., Exh. A at ¶ 57.

38 U.S.C. § 511 is the relevant statute governing judicial review of decisions made by the Secretary of Veterans Affairs. It states that

> The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b)[8], the decision of the Secretary as to any question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the of mandamus or otherwise.

38 U.S.C.A. § 511 (West Supp. 2001). The Supreme

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[8] Subsection (b) provides for four exceptions to the statute; (1) by the Court of Appeals for the Federal Circuit as to alleged violations of FOIA; (2) in cases involving life insurance benefits under 38 U.S.C. §§ 1975, 1984; (3) in cases involving housing and small business loans under 38 U.S.C. §§ 3701-3751; and (4) by the Court of Veterans Appeal in cases where a veteran filed a notice of disagreement with the decision of the VA with the Board of Veterans Appeals, on or after November

18, 1988. See New York v. Eadaro, 946 F. Supp. 240, 242 (E.D.N.Y. 1996) . None of these exceptions apply in this case.

Court first addressed the no-review clause in Johnson v. Robinson, 415 U.S. 361 (1974). In Johnson the Court distinguished between a constitutional attack on legislation governing the provisions of VA benefits which would entitle a plaintiff to district court review and a challenge to the Administrator's decisions of law or fact concerning the administration of benefits legislation which would not be reviewable under section 511. See id. at 367. Thus, under Johnson, district courts may review actions involving challenges to the constitutionally of veterans' benefits legislation, but may not review the application of such legislation to an individual's case. Any challenge to the amount of VA benefits received by a plaintiff cannot be reviews by a federal district court. See Tietjen v. United States Veterans Administration, 884 F2d 514, 515 (1989)

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Kerian argues that this court should look to the Supreme Court's ruling in Traynor v. Turnage, 485 U.S. 535 (1988) . While Kerian id correct that the Court held in Traynor that under 38 U.S.C. §211 a district court could review the question of whether a Veteran's Administration regulation violates the Rehabilitation Act, Kerian's argument ignores the changes that Congress made to the provisions when section 211 was repealed. Prior to 1991, 38 U.S.C. § 211 (a) governed judicial review of decisions by the Secretary of Veterans Affairs. In 1991, section 211 (a) was repealed and those provisions are now contained in 38 U.S. § 511. See Veterans' Judicial Review Act ("VJRA"), Pub. L. 102-83, § 2 (a) , 105 Stat. 378 (1991). Congress repealed section 211 because of their concern that "the

Court's opinion in Traynor would inevitably lead too increased involvement of the judiciary in technical VA decision-making.'" Larrabee v. Derwinski, 968 F.2d 1497, 1500 (2d Cir. 1992) (quoting H. R. Rep. No. 963, 100th Cong., 1st Sess. 27 (1988), reprinted in 1988 U.S.C.C.AN. 5782, 5803).

The VJRA provides a comprehensive process for appealing a decision of the Secretary of Veteran's Affairs. Under the VJRA, judicial review of veteran's benefits determinations is to be held in the Federal Circuit. See H.R. Rep. No. 963, 100th Cong., 1st Sess. 27 (1988), reprinted in 1988 U.S.C.C.AN. 5782, 5809; Larrabee, 968 F.2d at 1501. Congress's purpose in designing section 511 to provide judicial review in the Federal Circuit was twofold: (1) to ensure that benefits claims will not burden the courts and the VA with litigation and (2) to maintain uniformity by establishing an exclusive mechanism for appellate review of decision of the Secretary. See Surge v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994); see also Larrabee, 968 F.2d at 1501. Once a veteran has exhausted all administrative avenues by appealing the Secretary's decision to the Board of Veterans' Appeals, see 38 U.S.C.A. § 7105 (1991), he may then appeal that decision to the Court of Veteran's Appeal, see id. § 7104. Decisions of the Court of Veterans Appeals may then be appealed, but only to the Federal Circuit. See id. § 7292. Given this new statutory scheme, the Second Circuit determined that "[t]hese provisions amply evince Congress's intent to include all issues, even constitutional ones, necessary to a decision which affects benefits in this exclusive appellate review scheme." Larrabee, 968 F.2d at 1501 (citation omitted). A district court may therefore only hear facial challenges of legislation affecting veteran's benefits but it does not have jurisdiction over other constitutional and statutory claims since those must be pursed according to the appellate guidelines established under the VJRA. See id.

Insofar as Kerian claims that the reduction of his military separation pay, reserve pay and retirement pay by the amount of his disability pay is a violation of the Rehabilitation Act and the American with Disabilities Act, this court does not have the jurisdiction to reach that issue. The only claims, therefore, that may be reviewed by the courts are that the VA regulation violates Kerian's equal protection and due process rights under the Fifth Amendment of Constitution.[9]

a. Equal Protection

The Supreme Court has interpreted the Equal Protection component of the Fifth Amendment to stand for equal treatment by the government of all persons similarly situated. City of Cleburne v. Cleburne Living Center, 473 U.S 432, 440 (1985).

When deciding whether a piece of legislation is in violation of the Fifth Amendment, the general rule is that the legislation is presumed to be valid and will be sustained if the classification drawn by the statue is rationally related to a legitimate governmental interest. Id. at 440. An exception to this general rule exists when a classification is based on race, alineage, national origin, illegitimacy or gender. When these bases are

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[9] In his Amended Complaint, Kerian states in the abstract the "the laws and regulations mandating this discriminatory result" violates the Equal Protection and Due Process Clauses of the Fifth Amendment but does not specify to which "laws and regulations" he is referring. Lekakis Decl., Exh. A at ¶ 57. It ca be inferred based on the nature of his claim, that Kerian is referring to 10 U.S.C. § 12316 and 38 U.S.C § 5304. Under 10 U.S.C. § 12316, a member of the Army Reserve who is entitled to disability compensation because of prior military service may elect to receive military pay. See 10 U.S.C. §

12316 (a) (West Supp. 2001). Similarly, 38 U.S.C § 5304 states in relevant part that no person may concurrently receive both disability compensation and retirement pay, see 38 U.S.C § 5304 (c) (West Supp. 2001). Present, the Court will employ a heightened standard of review to determine whether the government has committed an equal protection violation. See id. When the claimed discrimination is based on any other classification, the government need only show that there is rational relationship between the legislation and a legitimate governmental interest. See Able v. Unites States, 155 F.3c 628, 631 (2d Cir. 1998); Cecos International, Inc., 895 F.2d 66, 72 (2d Cir. 1990).

In this case, however, it is not necessary that the court even reach the issue of whether the government can demonstrate that the relevant legislation bears a rational relation to a legitimate interest since Kerian does not meet the threshold requirement for an equal protection claim which is showing that the government has discriminated amongst similarly situated groups. See Eagleston v. Guido, 41 F.3d 865, 876 (2d Cir. 1994).

The Amended Complaint does not contain any allegations that Kerian is being treated differently from other receiving similar VA benefits and Army Voluntary Separation Incentive payments. In his Amended Complaint, Kerian states that he is being discriminated against as a veteran and disabled former member of the United States military. Lekakis Decl., Exh. A at ¶ 57. Nowhere in the Amended Complaint does Kerian assert that there is another group that is similarly situated to disabled veterans who are not prohibited from concurrently receiving military pay and VA disability compensation. See Patel v. Penman, 103 F.3d 868, 876 (9th Cir. 1996) (upholding grant of summary judgment to defendants equal protection claim because plaintiffs failed to show that those who ere similarly situated were treated any differently than plaintiffs); Samaad v. City of Dallas, 940 F.2d 925, 941-42 (5th Cir.

1991) ("Because the Kerians failed to allege the existence of a similarly situated non-minority neighborhood (i.e., one near a location suitable for an automobile race), their complaint does not allege an equal protection violation.").

b. Due Process

Kerian's claim that the Veteran's Administration has violated his substantive due process rights is similarly faulted. The Due Process Clause is intended to secure an individual from an abuse of power or its use for the purpose of oppression by government officials. See Daniels v. Williams, 474 U.S. 327. 331 (1986); Howard v. Grinage, 82 F.3d 1343, 1350 (6th Cir. 1996). In order to establish a substantive due process claim, a Kerian must show that the government has deprived him of life, liberty or property. To have a property interest, Kerian "clearly must have more than an abstract need or desire for it...He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In his Amended Complaint Kerian makes no such claim of entitlement to any property interest that he is being denied. Accordingly, the absence of any such claim by the plaintiff is a defect in his substantive due process allegation.

Furthermore, eve if Kerian had asserted that the government impaired a legitimate liberty or property interest, Kerian's claim would still not survive. When a statute or regulation is alleged to violate a plaintiff's substantive due process rights, it is considered presumptively valid so ling as the government can show that there is a rational basis for the law and the deprivation is not clearly arbitrary and unreasonable. See Curto v. City of Harper Woods, 954 F.2 d 1237, 1240 (6th Cir. 1992). A law will be considered valid if it advances a legitimate governmental interest or if it is reasonable means of advancing a legitimate interest. See id. For claim of a substantive due process violation to prevail where a non-fundamental right is

implicated, the plaintiff must show that the conduct "shocks the conscience" of the court. Howard v. Grinage, 82 F.3d 1343, 1350. In the present case, Kerian has alleged no facts which will put this court on its guard when reviewing the challenged statutes. Kerian's complaint fails to overcome the presumption that 10 U.S.C. § 12316 and 38 U.S.C § 5304 are reasonable mandates of the law which have been enacted to serve a legitimate governmental purpose. His claim of the Fifth Amendment Due Process violation is therefore dismissed.

(7) Fifth Amendment Claim Against the Department of Justice

In his fifth claim for relief, Kerian alleges that the Department of Justice ("DOJ") regulations on "Supplemental Standards of Ethical Conduct for Employees of the Department of Justice," published at 5 C.F.R. § 3801.106 (b) prevent him form engaging in limited, part-time practice law outside of his employment with the Immigration and Naturalization Service ("INS") and therefore deprive him of a constitutionally protected liberty interest. See Lekakis Decl., Exh. A at ¶¶ 62-63. 6 C.F.R. § 3801.106 (b) states in relevant part:

> (b) *Prohibited outside employment. (1)* No employee may engage in outside employment that involves:
>
> (i) The practice of law, unless it is uncompensated and in the nature of community service, unless it is on behalf of himself, his parents, spouse minor children;...

The first question the court must ask regarding Kerian's claim is whether pursing employment as an attorney outside of his position with the INS is protected liberty interest. The Supreme Court has made it very clear that, under protection of the Fifth and Fourteenth Amendments, a person has a liberty interest in pursing an occupation. See

Greene v. McElroy. 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment..."); Traux v. Raich, 239 U.S. 33, 41 (1915) ('[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) ("A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravenes the Due Process or Equal Protection Clause of the Fourteenth Amendment."). Since the "right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Traux v. Raich, 239 U.S. 33, 41 (1915).

However, this right to engage in an occupation of one's preference may be constrained within the strictures of due process. See Schware, 353 U.S. at 238. The Court recognized that a state mat place limits on a person's ability too engage in a certain profession so long as there is a rational relationship to a legitimate governmental interest, id. at 239, but held that denying Petitioner the opportunity to qualify for the practice of law deprived him of due process, id. at 247.

The present case, however, is distinguished from Schware. The Kerian here is not foreclosed from anything. The DOJ's regulation does not permanently exclude Kerian from the practice of law. It does not even exclude him temporarily from the practice of the law if he so chooses. Kerian does not allege that he cannot seek other employment in which he can engage in the private practice law where the DOJ regulation will affect him. Accordingly, Kerian differs from the plaintiff in Schware who

was forbidden even to take the bar examination and was thus truly foreclosed from his ability to seek employment as an attorney. Id.

An employee is not deprived of a liberty interest when is future employment faces obstacles "lying within the employee's power to correct." Russell v. Hodges, 470 F.2d 212, 217 (2d Cir. 1972). In O'Neill v. City of Auburn, 23 F. 3D 685 691-93 (2D Cir. 1994), the Second Circuit held that an employee who was terminated because of charges that he had "poor relationships" with state agencies, and his work was not "up to par" did not have a liberty interest that was violated because the employee had the ability to correct these problems. Id. Similarly, in the present case, Kerian has the ability to correct the situation so as to be able to engage in the private practice of law. Kerian can resigning from his position at the INS. The moment he does that he will be free to begin looking for legal work. Kerian cannot both voluntarily remain as an employee of the INS and then turn around and complain that he has liberty interest in the pursuit of his chosen profession as a lawyer that has been violated by the government. The right to engage in the profession that one chooses is not absolute. . See Schware, 353 U.S. at 239.

Similarly, Kerian's equal protection claim must be dismissed. In order to assert a Fifth Amendment Equal Protection claim, Kerian must demonstrate that the Government discriminated among similarly situated groups. City of Cleburne, 473 U.S. at 439; Eagleston, 41 F.3d at 876. Thus, Kerian must show that he has somehow been treated differently than others in a similar situation. Klinger, 31 F.3d at 731.

Legislation that does not employ suspect classification or impinge on fundamental rights must be upheld against equal protection attack as long there is a rational relationship to a legitimate governmental purpose.

Hodel v. Indiana, 452 U.S. 314, 331 (1981); Frazier v. Manson, 703 F.2d 30, 33 (2d Cir. 1983). Legislation is presumed to rational and will usually only be found to be invalid upon finding that "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the [government's] actions were irrational." Hodel, 452 U.S. at 332 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

Although it is unclear in his complaint what distinction the government has drawn that Kerian is challenging, it is clear that Kerian does not allege any discrimination on the basis of race, alienage, national origin, or gender. If Kerian's equal. protection challenge is to governmental regulation itself, Kerian's claim must fail. The DOJ's regulation applies to all employees working for that executive department. Therefore, no suspect classification is at issue and this court need only apply the minimal standard of review to determine whether the DOJ has a rational basis for preventing its employee from engaging in the outside practice of law when it is not for immediate family or community service. See Cleburne, 473 U.S. at 442.

As Kerian notes in his complaint, the purpose behind the regulation at issue is to 'avoid any or all conflicts [of interest] or even the appearance thereof." Lekakis Decl., Exh. A at ¶ 63. Kerian does not argue that he desire of the DOJ to prevent it is arbitrary or irrational. See Hodel, 452 U.S. at 331-32. In fact, Kerian states in his Response Memorandum that he "[does] not contest the fact that [he] should not practice [his] profession where there might be so little as an appearance of impropriety" and he agrees to limit his outside practice so as to avoid the appearance of any such conflict. Pl.'s Resp. at 11. In other words, Kerian believes that because he is willing to limit his action, the government no longer has a right to have a legitimate (by Kerian's own admission) regulation without

violating the Equal Protection Clause. What Kerian's argument fails to acknowledge is that the question of whether the government has violated the Fifth Amendment centers on the government's regulation and not on the Kerian's actions in response to this regulation. The mere fact Kerian is willing to conduct his actions in a way that negates the need for the regulation does not mean that the purpose of the regulation is no longer legitimate. Although, as a public employee, Kerian does not loses his constitutional rights, See United States v. National Treasury Employee Union, 513 U.S. 454, 115 S. Ct. 1003 (1995) (holding that lower level public employees cannot be prohibited for receipt of honoraria for writings unrelated to their work), he is an attorney and, while he might endeavor to avoid the appearance of conflict, as a practical matter, this is something clearly beyond his control. For example, if he were to handle a real estate transaction which would appear to be totally unrelated to his work, it could easily turn out that one of the attorneys that he is dealing with has a case with his agency. Immediately, this would raise an appearance of interest.

Kerian also seems to be arguing that he is being treated differently from the other DOJ employees. See Lekakis Decl., Exh. A at ¶ 62. However, nowhere in the Amended Complaint does Kerian allege that any of these other employees are engaged in the private part time practice of the law in a manner inconsistent with 5 C.F.R. § 3801.106 (b) (e.g. permitting practice of law for non-paid community service , and/or for family members). Clearly, this argument fall short of the minimum allegations needed to establish that Kerian's fifth amendment equal protection rights have been violated since none of the alleged facts support a conclusion that Kerian has been treated any differently from those similarly situated. See Patel, 103 F.3d at 876.

Conclusion

For the reasons stated above, the Government's Motion to dismiss is granted and all of Kerian's claims are dismissed. Kerian is granted leave to amend within thirty days but only with respect to his challenge to the ABCMR's decision related to his discharge and only for equitable relief. After, reviewing his other requests for leave to amend, it is apparent that such amendments would be futile. If no amended complaint is filed within thirty days of this decision, the Clerk of the Court is directed to close the case.

Brooklyn, New York Dated: October 16, 2001

SO ORDERD:

/S/

David G. Trager

United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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PAUL D. KERIAN

MERORANDUM AND
REVISED ORDER

Plaintiff,

against –
Civil Action No.

CV 00-745

(DGT)

LOUIS CALDERA, Secretary of the Army, WILLAIM S. COHEN, Secretary of Defense, JANET RENO, United States Attorney General, and TODD D. WEST, Secretary of Veterans Affairs,

Defendants.

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TRAGER, District Judge:

Plaintiff Paul Kerian ("Kerian"), a lawyer, filed his original complaint pro se on February 4, 2000, asserting a variety of claims against the former Secretary of the Army, Secretary of the Defense, Secretary of Veterans Affairs and the United State Attorney General. Among his many claims for relief, Kerian alleged that defendants forced him to leave active military service, in violation of his rights to Due Process and Equal Protection guaranteed of the Fifth Amendment. On September 28, 2001, all Kerian's claims were dismissed, except that as for one claim Kerian was given leave to amend the complaint. Subsequently, on January 10, 2002, Kerian filed a motion for reconsideration of the dismissal of Kerian's claims and a motion for leave to amend his complaint.

Background[1]

Kerian served as a Judge Advocate General ("JAG") in the United States Army (the "Army") during a period of time, which included operations Desert Storm of the Persian Gulf War in 1991. (Lekakis Decl., Exh. A (Kerian's 1st Amended Compl.) at ¶¶ 2a, 11, 15). Kerian claimed that, during operations Desert Storm he was forced to participate in war crimes perpetrated by the Army against Iraqi civilian refugees and prisoners of war. (Id. at ¶¶ 2a, 8-11). According to Kerian, he repeatedly reported these "crimes" to his superior Judge Advocate and later to the Inspector General ("IG") and commanding General. (Id. at ¶¶ 14, 34).

In 1991, Kerian received an unfavorable Officer Efficiency Report ("OER") from his superior officer

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[1] The following is a brief background of the case. The facts of this case recited in greater detail in the Memorandum and Revised Order, entered October 18, 2001. at 2-6.

and was later denied an end-of-tour award and promotion to Major. (Id. at ¶ 15 –16). After denial of the promotion, Kerian chose to leave active military service and avail himself to the Army's Voluntary Separation Incentive, a separation
incentive payment for officers who wish to leave active military service. (Id. at ¶ 16). As a participant in this program, Kerian receives an annual payment in the amount of $11,233.89 for 22 years. (Id. Exh. B at 11, 293).

However, Kerian believed that he was denied his promotion and other accolades in retaliation for his conversations with the IG, and in November 1991 he filed a whistle blower protection petition along with a request for an investigation of the alleged war crimes with the Department of the Army ("DA") and the Department of Defense ("DOD"). (Id. at Ex. A at ¶ 17; Exh. B at 102-13). Kerian's request was denied. Kerian appealed the denial of whistle blower

protection to the Army Board for the Correction of Military Records ("ABCMR"), requesting the correction of his military record by removal of the negative portion of the OER at issue. (Id. Ex. B at 86-100). Claiming that Kerian had not yet appealed the OER; and, therefore, had not exhausted all available remedies, the ABMCR responded in a letter dated February 19, 1993, that it would not yet consider his application. (Id. at 72-75). The ABMCR also affirmed the decision of the DA and DOD regarding Kerian's request for whistle blower protection. (Id.)

In a memorandum dated November 30, 1993, Kerian administratively appealed the OER. (Id. at

62-64). On August 23, 1994, a Case Summary was prepared by the Officer Special Review Board ("OSRB"), which concluded that the senior rater who had given Kerian an apparently less favorable review had not served in that capacity for the required minimum number of days to be qualified to rate Kerian. The OSRB decided that the whole portion of the senior rater's comments would be removed and replaced with the statement: "I am unable to evaluate the rated officer because I have not been his senior rater for the required number of days." (Id. at 12-13, 29-32, 58). The OSRB further determined that it was not convinced that Kerian would have been promoted had the change been made before Kerian was considered for promotion. (Id. at 33, 58).

Kerian continued to believe, however, that the initial decision not to promote him to Major and the decision of the OSRB was in retaliation for his alleged whistle blower activities, and on September 12, 1994, Kerian filed a claim with the IG requesting that an investigation be undertaken to determine the merits of his compliant. (Id. at 57). The IG requested that Kerian provide some factual basis for his allegation that the ORSB retaliated against him because they would not conduct an investigation based purely on Kerian's speculation. (Id. at 22-24). Kerian failed to provide this additional information, and in letter dated March 7, 1995, the IG informed him his case had been closed. (Id. at 21).

Kerian subsequently re-petitioned the ABCMR for the correction of his military records and re-appealed the denial of whistle blower protection. (Id., Exh. A at ¶ 22; Exh. B at 57). Included in this re-appeal to the ABCMR was Kerian's request for administrative review of the alleged defective DOD/DA and OSRB processes and procedure and the "star chamber" nature of the proceedings. (Id., Ex. A at ¶ 22). The ABCMR denied all relief. (Id. at ¶ 24, Exh. B at 3-18). In a letter dated February 8, 1996, the ABCMR informed Kerian that they were denying his petition and would reconsider his application only if he were to

present newly discovered relevant evidence that was not available for consideration by the Board when it initially denied his application. (Id., Ex. B at 1-2). Kerian did not attempt to present any further evidence.

As a result of the time Kerian spent in active military service, he has a service- connected skin condition and had been granted by defendant Department of Veteran's Affairs ("VA") a 10% disability and the right to receive disability compensation in the amount of approximately $90.00 per month. (Id., Ex. A at ¶ 55, Ex. C at 1-2). Kerian was given the option to receive military pay for the performance of active or inactive duty in lieu of VA benefits while on reserve duty, and he elected to do so. (Id., Ex. D at 1).

After Kerian's discharge from the Army, he obtained employment with the United States Department of Justice, Immigration and Naturalization Service ("INS"). (Id., Ex. A at ¶ 62). As part of his responsibilities, Kerian adjudicated and later supervised others adjudicating application for political asylum. (Id.) As an employee of the DOJ, Kerian is prohibited by DOJ regulations from engaging in any outside practice of law. (See 5 C.F.R. § 3801.106).

After review of Kerian's various allegations, a Memorandum and Revised Order was entered on October 18, 2001, dismissing all of his claims, except that with regard to his claim against the ABCMR. Kerian was given leave to amend if he could allege that the decision of the ABCMR with respect to Kerian's discharge from service was arbitrary or capricious. (See Mem. & Rev. Order at 25). Subsequently, Kerian submitted a motion for reconsideration of the order dismissing his claims, as well as a motion to broadly amend his complaint. (See generally Pl.'s Mot. For Recons. And proposed Sec. Am. Compl. ("Pl.'s for Recons.")).[2]

Discussion

Under Rule 60(b)(2) of the Federal Rules of Civil Procedure, a party may move for reconsideration of a final order or judgment on the basis of "newly discovered evidence that could not have been discovered earlier and that is relevant to the merits of the litigation". Hemric v. City of New York, 96-CV-0213, 2002 WL 1203850, at *2 (S.D.N.Y. June 3, 2002) (citing Schwartz v. Capital Liquidators, Inc., 984 F.2d 53, 54 (2d Cir. 1993) (per curiam)). Such motions, however, are generally not favored, "United States v. Int'l Bhd. Of Teamster, 247 F.3d 370, 391 (2d Cir. 2001), and may not be used "solely to re-litigate an issue already decided." Shrader v. CSX Tranp.. Inc., 70 F.3d 255, 257 (2d Cir. 1995); accord Resources N.E. of Long Island v. Town of Babylon, 80 F. Supp. 2d 52, 64 (E.D.N.Y.) 2000). The standard for granting motions under Rule 60(b) is very strict and "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in

other words, that might reasonably be expected to alter to conclusion reached by the court." Shrader, 70

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[2] Citations to "Pl.'s Mot,. for Recons. & 2nd Am. Compl." Refer to Kerian's brief and memorandum of law in support of his motion for reconsideration and leave further amend his complaint, dates January 10, 2002.

F.3d at 257 (citing Schonberger v. Serchuck, 742 F. Supp. 108, 119 (S.D.N.Y. 1990))). Indeed, a motion under Rule 60(b) "is properly granted only upon showing of exceptional circumstances." Int'l Bhd. Of Teamster, 247 F.3d at 391 (citing Padding Partners v. Bouchard, 34 F.3d 1132, 1142 (2d Cir.1994) (emphasis added)). Additionally, although Kerian is proceeding pro se,

he "is an attorney and his complaint will not be given the very liberal consideration afforded non-lawyer pro se parties." Guardino v. Am. Sav. & Loan Ass'n, 593 F. Supp. 691, 694 (E.D.N.Y.) 1984).
(1)

Claims Against the DA and DOD

Kerian's first claim against the DOD and DA alleged that he was constructively discharged from the army. According to Kerian, he was forced to voluntarily discharge himself from the army as a result "fraud, deception and duress" committed by the DOD and the Army. Pl's. Recons. At 28. In its original order, Kerian's constructive discharge claim was dismissed on the ground that the statute of limitations had expires. See Mem. & Rev. Order at 8-13. Although Kerian claimed that equitable tolling of the statute was appropriate because of "grave breeches [sic] of the Geneva Convention and various exceptions," the Court held that there was no 'casual relationship" between these circumstances and Kerian's untimely filing of his complaint. Id. at 9. As a result, and because Kerian had pointed to no "fraud or concealment" that prevented him form filing his complaint on time, the Court held that equitable tolling of the statute was not appropriate. Id.

Kerian now attempts to establish such "fraud or concealment" committed by the DOD and DA. See Pl.'s Recons. At 19, ¶ 23. Kerian alleges that "wrongful, fraudulent, deceptive and legally infirm: practices rendered his discharge from the army involuntary. Id. However, Kerian still does not allege that these practices prevented him from filing his complaint on time. Kerian has submitted papers reciting conclusory statements, such as "fraud, deception, duress and deceit," but he does not explain why he would be entitled to an equitable tolling of the statute limitations. Thus, because Kerian still does not point to any facts or evidence that prevented him

from timely filing his compliant, and does not allege that any controlling law was overlooked, his motion to reconsider his constructive discharge claim is denied.

Kerian' second claim against the DOD and DA challenged the way military affairs foreign policy were conducted, including the administrative procedure by which his claims were denied and the allegedly harsh treatment of illegitimate children of United States soldiers in foreign countries. Specifically, Kerian claimed that the administrative legal processes made available to him after his discharge were unconstitutional and violated Due Process Clause of the Fifth Amendment. This claim was dismissed on the grounds that the Supreme Court had already deemed the appeal procedure provided by the ABCMR constitutional and not violative of Due Process Clause. See Mem. & Rev. Order at 35 (citing Chappell v. Wallace, 462 U.S. 296, 302-03, 103 S. Ct. 2362, 2368 (1983))). With respect to his claim regarding illegitimate children, it was dismissed on the ground that Kerian had no standing to assert a claim for relief on behalf of illegitimate children around the world. See id. at 32. In his motion for reconsideration, Kerian does not allege that any controlling law or evidence was overlooked on this matter. Rather, he claims that he standing to bring a claim on behalf of illegitimate children because he is also "damaged goods" and suffered wrongdoing in his life. of illegitimate children. See Pl.'s Recons. At 10-11. This contention, however, would not have been sufficient on a motion for reconsideration. Thus, for the same reasons cited in the original decision, Kerian's motion for reconsider his claim for relief on behalf of illegitimate children of the United States Army and certification of a class to represent these children is denied.[3]

(2)

Claims against the VA

In his original complaint Kerian's first claim against the VA challenged the military regulation under which his military pay was reduced. See Mem. & Rev. Order at 42. Essentially, Kerian claimed that this reduction of his pay violated the Rehabilitation ct and the Americans with Disabilities Act because there was a three-time reduction of his pay. Kerian claimed that his military separation pay and his military reserve pay had been reduced by the amount of his VA disability pay and that when he retires, the military reserve pay that he will receive will de reduced by the amount of his disability pay. See id. at 42-43.

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[3] In his original complaint, Kerian also alleged constitutional, Kerian also alleged constitutional, Title VII, and tort claims against the DOD and DA, claiming that, inter alia, he was forced to "suffer server financial and emotional harm" by being forced to commit war crimes. Mem, & Rev. Order at 29. These claims were dismissed on the ground that according to controlling law, Kerian was barred from bringing these claims against his superior officers. See id. at 32. In his motion for reconsideration, Kerian fails to address these claims, so it is not necessary to address them here.

This claim was dismissed for lack of jurisdiction. Specifically, the Court held that, according to prevailing case law, "a district court doe not have jurisdiction over constitutional and statutory claims since these must be pursued according to the appellate guideline established under the VJRA.,"[4] Id. at 46 (citing Larrabee v. Derwinski, 968 F.2d 1497, 1501 (2d Cir. 1992)). Kerian's motion for reconsideration alleges nothing new. To the extent he even mentions these allegations in his motion, the wording is identical to his original complaint. Thus, Kerian points to no new evidence or overlooked precedent to present grounds for reconsideration.

Kerian also alleged Due Process and Equal Protection claims against the VA. Specifically, in his original complaint Kerian claimed that "the laws and regulations mandating the discriminatory result" violated the Equal Protection and Due Process Clauses of the Fifth Amendment. See id. at 46, n. 9. The Court, after noting that Kerian did not even specify to what "laws and regulations" he was referring to, interpreted Kerian's ----------

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[4] The Veterans' Judicial Review Act ("VJRA") provides a comprehensive process for appealing a decision of the Secretary of Veterans Affairs. According to the Second Circuit and prevailing case law, Kerian could not recover under these claims in the district court. See Mem. & Rev. Order at 42-45 (discussing Travnor v. Turnage, 485 U.S. 535 (1988); Surgue v. Derwinski, 26 F. 3d 8, 11 (2d Cir. 1994); Larrabbee, 968 F.2d at 1501).

claim as referring to 10 U.S.C. § 12316 AND 38 U.S.C. § 5204 (a).[5] With respect to his Equal Protection claim, it

was dismissed on the ground the "Kerian did not assert that there was another group similarly situated to disabled veterans who are not prohibited from concurrently receiving military pay and VA disability compensation." Id. at 48. In his motion for reconsideration, Kerian again fails to make this essential allegation. Kerian recites his original allegation, including a new sentence stating that "[p]laintiff is a member of a class discriminated against because they are disabled in

manner which is different and much more discriminatory than other federal employees qualified for retired pay." Pl.'s Recons. At 32, ¶ 57. Yet, Kerian fails to mention (1) which other "federal employees" he is

referring to or (2) whether these federal employees, unlike Kerian, are exempt from the provisions of 10 U.S.C § 12316 or 38 U.S.C. § 5304. Thus, Kerian still does not make key allegations necessary to comprise an equal protection claim: that there is another group similarly situated that is treated differently. Moreover, Kerian does not allege that in dismissing this claim, any prevailing law or evidence was overlooked. Consequently, Kerian's motion to reconsider his equal protection claim against the VA is denied.

Kerian's final claim against the VA was that his substantive due process rights were violated. However, this claim was dismissed on the ground that Kerian failed to establish that the government deprived him of a proprietary interest without due process of the law. See Mem & Rev. Order at 49 (citing Bd., of Regents v. Roth , 408 U.S. 564, 577 (1972)). With respect to this claim in his motion for reconsideration, Kerian again does nothing

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[5] Under 10 U.S C. § 12316, a member of the Army Reserve is entitled to elect to receive either disability compensation or reserve military pay. Under 38 U.S.C. § 5204(a), no person can receive both disability compensation and retirement pay. See Mem. & Rev. Order at 46, n. 9.

but resubmit the exact wording from his original complaint in an apparent attempt to re-litigate issue already decided. Thus, Kerian's motion to reconsider his Due Process claim against the VA is denied.

Claims against the DOJ

In his original complaint, Kerian asserted Fifth Amendment claims against the DOJ, alleging that he was prevented from engaging in a part-time practice of law outside of his employment with the INS. See id. at 50. Specifically, Kerian alleged that the prohibition against engaging in the practice of law deprived him of his "constitutionally protected liberty" and right to equal protection. See id. (referring to Pl.'s Original Compl. (Lekakis Decl., Ex. A at ¶¶ 62-63)). This claim was dismissed on the ground that Kerian was free to practice law, as the DOJ regulation neither permanently not temporarily excluded Kerian from the practice of law if he ceased to be employed by the DOJ. See id. at 52. Additionally, it was held that Kerian had once again failed to allege that there was a group of DOJ employee similarly situated who were allowed to practice law, which precluded any Equal Protection claim. In his motion for reconsideration, Kerian does not address these issues in any more details than before, nor does he attempt to rectify the faults of his original complaint by pointing to a group of people treated differently under the sane DOJ regulations. This fact, along with Kerian's failure to allege the overlooking of any evidence or controlling case law, precludes Kerian from reconsideration of his Fifth Amendment claim against the DOJ. [6]

(4)

Motion to Amend the Complaint

According to Rule 15 of the Federal Rules of Civil Procedure, "after a pleading is amended once ... a party may amend the party's pleading only by leave of court or written consent of the adverse party". Additionally, Rule 15 states the "leave to amend shall be given freely when justice so requires." In determining whether leave to amend should be granted, the

district court has its discretion to consider, inter alia, the apparent "futility of the amendment" Grace v. Rosenstock, 228 F.3d 40, 53 (2d Cir. 2000) (citing Foman v. Davis, 371 U.S. 178, 182 (1962); John Hancock Life Ins. Co. v. Amerford Int'l Corp., 22 F.3d 458 462 (2d Cir. 1994)).

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[6] Kerian's final requests for reconsideration involve the certification of a class to represent the illegitimate children of United Stated soldiers across the world, as well as the "inappropriate rejection and later implementation" of Kerian's suggestions regarding the treatment and care of these children. These claims were dismissed on the ground that "any policy determination on these basis is reasonably related to the furtherance of national defense" Mem. & Rev. Order at 36. To the extent that Kerian does nothing but resubmit his original allegations with respect to these matters, his motion to reconsider is denied in the respect as well.

a. Claims against the ABCMR

In the Court's Memorandum and Revised Order Kerian was given leave to amend his complaint with respect to the decision of the ABCMR concerning his discharge from the Army. See Mem. Rev. Order at 25. Specifically, the Court stated that if Kerian had a factual basis to allege that the decision of the ABCMR concerning his discharge was arbitrary or capricious, his second amended complaint could request only equitable relief. See

id. In his proposed second amended complaint, Kerian fails to make such allegations. In fact, Kerian merely re-submits the section of his original complaint pertaining to his allegations against the ABCMR, containing the same conclusory statements put forth in his original complaint. See Pl.'s Mot. for Recons. 2nd Am. Compl. At ¶ 20. Kerian still does not set forth any factual basis to allege that the decision of the ABCMR with respect to his discharge was arbitrary, capricious, or contrary to existing law. Furthermore, Kerian does nor even attempt to correct the faults of his original complaint and merely relies on vague statements, which it has already been determined entitle him to no relief. Thus, Kerian's attempt to amend his complaint, as allowed by the Revised Memorandum and Order, fails to state a claim against the ABCMR.

b. Claims under 42 U.S.C. § 1985

Kerian's motion for reconsideration and leave to amend additionally asserts conspiracy claims under 42 U.S.C. § 1985(2) AND (3). [7] Under 42 U.S.C. § 1985, "such a conspiracy to violate rights is actionable only if it involves a discriminatory animus based on a race or some other invidious classification." Posr v. Court Officer Shield #207, 180F.3d 409, 419 (2d Cir. 1999) (citing United Bhd. of Carpenters. Local 610 v. Scott, 463 U.S 825, 829 (1983)). In addition, mere conclusory statements without factual allegations are not sufficient to create a valid claim under § 1985. See Temple if the Lost Sheep, Inc. v. Abrams, 930 F.2d 178, 185 (2d Cir. 1991) (citing New York State Nat'l Org. for Women v. Terry 886 F.2d 1339, 1358 (2d Cir. 1989)).

In the present case, Kerian's Proposed Second Amended Complaint contains only broad allegations of conspiracy, without stating allegations to support a claim. For instance, Kerian claims that "the

conspirators advance isolationist, unilateral sovereign prerogatives to maintain the impunity for those violating treaty obligations and principals [sic] for which the Unites States stands." Pl.'s Proposed 2nd Am. Comp. at ¶ 1d. (C). Kerian goes on to state that, "these acts are illegal, they lead to more war." Id. Kerian fails to make clear, however, who these "conspirators" actually are. Moreover, Kerian also fails to make clear what he is alleging these "conspirators" actually did violate his rights. In addition, Kerian alleges no racial or other 'class based animus" that would motivate a conspiracy to violate his rights. Rather, Kerian merely makes vague and conclusory statements unsupported by any facts to prove that there was

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[7] 42 U.S.C. § 1985(2) creates a cause of action for damages as a result of a conspiracy to obstruct justice. 42 U.S.C. § 1985(3) creates a cause of action for damages for a conspiracy to deny equal protection. actually a conspiracy against him. Thus, Kerian proposed amendment to his complaint fails to state claim under 42 U.S.C. § 1985. See Temple of Lost Sheep, 930 F.2d at 178 (affirming as dismissal of § 1985 claims because appellant's claim only contained conclusory allegations.)

Conclusion\ For the reasons stated, Kerian's motion for reconsideration is denied. Kerian's motion for leave to amend his complaint is denied.

Dated: Brooklyn, New York

August 28, 2003

SO ORDERED:

Original signed
David G. Trager

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 9th day of December, two thousand and four.

PRESENT:

HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER, JR.,
HON. REENA RAGGI,

Circuit Judges.

PAUL D. KERIAN, *Plaintiff-Appellant*,

v. No. 03-6253

LOUIS CALDERA, Secretary of the Army The Pentagon, Washington, DC 20310, WILLIAM S. COHEN, Secretary of Defense The Pentagon, Washington, DC 20301, JANET RENO, United States Attorney General 950 Pennsylvania Ave. NW., Washington DC 20530, TOGO D. WEST, JR., Secretary of Veterans Affairs Vermont Avenue NW., Washington DC 20420, GEORGE BUSH, *Defendants-Appellees,*

For Plaintiff-Appellant: PAUL D. KERIAN, *pro se*, Valley Stream, N.Y. 11580

For Defendants-Appellees: ARTEMIS LEKAKIS, Assistant United States Attorney,
for Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York (Varuni Nelson, Assistant United States Attorney, *on the brief*)

Appeal from the United States District Court for the Eastern District of New York
(Trager, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Plaintiff-Appellant Paul D. Kerian ("Kerian"), an attorney appearing *pro se*, brought a cavalcade of claims related to his service in the Judge Advocate Generals' Corps of the U.S. Army. The court (Trager, *J.*) granted the defendants' motion to dismiss Kerian's complaint and then denied Kerian's motion for reconsideration and to amend his complaint. Kerian appeals the decision of the court with respect to the majority of his claims. Specifically, he asserts that the district court erred in (1) dismissing his claims against the Department of Defense ("DoD") for how it conducted its military affairs in Operation Desert Storm; (2) dismissing his claims against the DoD for

retaliating against him for reporting alleged military violations and for constructively discharging him; (3) refusing Kerian's request to certify, in his name, a class of illegitimate children of soldiers and veterans to raise claims against the DoD; and (4) denying Kerian's motion for reconsideration and to amend his complaint. We affirm for substantially the reasons given by the court below. We have considered all of Kerian's arguments and find them to be without merit. We therefore AFFIRM the judgment of the district court.

For the Court,
ROSEANN B. MACKECHNIE, Clerk of Court
by: _____
Oliva M. George, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York 10007

Roseann B. MacKechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 31st day of March, two thousand five.

PAUL D. KERIAN,

Plaintiff – Appellant,

03-6253-CV

(Seal of United States)

v.

Court of Appeals

Second District

"Filed" Mar 31 2005)

LOUIS CALDERA, Secretary of the Army The Pentagon, Washington, DC 20310, WILLIAM S. COHEN, Secretary of Defense The Pentagon, Washington, DC 20301, JANET RENO, United
States Attorney General 950 Pennsylvania Ave. NW.,

Washington, DC 20530, TOGO D. WEST, JR., Secretary of Veterans Affairs Vermont Avenue NW., Washington, DC 20420, GEORGE BUSH,

Defendants – Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Paul D. Kerian. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By:

(Signature)_____

Motion

Staff Attorney

APPENDIX E

DEPARTMENT OF THE ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
CHARLOTTESVILLE, VIRGINIA 22903

AETS-JA

20 NOV 91

Memorandum For the Inspector General, HQDA, Washington, DC 20310-1720

Subject: Request for Investigation and Military Whistleblower Protection UP DOD Directive 7050.6., 10 U.S.C. 1034.

1. I, CPT Paul D. Kerian, was the Command Judge Advocate for VII 14th MP Bde, VII Corps, for Operations Desert Shield and Storm. I was the attorney responsible for planning, training, and executing the enemy prisoner of war mission for the VII Corps. In addition to my JA responsibilities, I was an MP Bde S3 action officer, convoy commander and performed other duties as required. Frequently, mission accomplishment required that large numbers of soldiers be placed under my command. At various times I had to lead convoys through mined breeches in enemy defenses, fly to the front (26 Feb. 91 (2ACR) to evacuate EPW by helicopter and coordinate future EPW evacuations, and lead large convoys up and down pipeline and other MSRs with untrained drivers and equipment full of patent and latent defects.

2. In performing my mission, I was forced to frequently compensate for violations which the VII Corps SJA, COL Walter B. Huffman, my senior rater, would not take action to correct. For my actions in making known his derelictions, COL Huffman has retaliated against me. I have had my promotion potential, and thus my career, destroyed in a most deliberate fashion for merely complying with mandatory Rules of Professional Conduct, AR 27-26 rules 1.7, 1/13, 2.1 and 5.4(e) and (F), which I am sworn to uphold.

3. On 15 March 1991, after concluding prisoner of war operations, the planning and initial execution of the customs mission for VII Corps and a court-martial prosecution within my brigade, I was ordered to Rahfa, Saudi Arabia. As the Convention expert, I was to act as the on site legal advisor to the refugee "security mission" just north of Rahfa, Saudi Arabia, in Iraq. Rafta, on the western flank, was formerly headquarters of 18th Airborne Corps

whose area of "occupation" included a large part of southern Iraq. VII Corps assumed 18th Corps HQ compound on the Rahfa Airfield and responsibility for the protection of refugees from Ira who were criminally under the control of coalition forces; U.S., Saudi and French.

4. As I left for Rahfa elements of my 14 MP Bde, the 793rd MP BN, had already established a defensive perimeter around the refugee camp. Later, the 2d Armored Division (fwd) arrived replacing residual elements of the 11th Avn Bde, VII Corps, who had initially handled the refugee mission subsequent to the departure of 18th Corps. There was an ongoing disregard of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (GC) DA Pam 27-1, which allowed the situation to degenerate to what I encountered upon my arrival. Generally, the intent of the GC is to make states responsible for the people under their control. When refugees came under our control and protection they should have been accounted for and their age, status, nationality, identity, and state of health assessed. This is a fundamental requirement of the GC because these factors establish and vary their protections. The GC resulted from the WWII experience with refugees disappearing and being moved around between (axis) allies for purposes unrelated to the refugees' best interest. The identity, status and location of refugees should have been reported to the International Committee of the Red Cross (ICRC). My suggestion in this regard was overruled by COL Huffman, who insisted that all we need to do is provide a bottom line number to the UN committee for refugees.

5. I was briefed on the Rahfa situation prior to assuming the refugee mission. COL Huffman explained to me that the Saudi Arabians accepted responsibility for uncounted refugees from the U.S. occupied area in Iraq but later moved the refugees back into Iraq (under duress) by making food and water available to them only after they

again crossed the international border back into Iraq. After the refugees were moved into Iraq they required protection, thus the need for U.S. MPs, combat aviation and armored division asse[illegible]rior to my departure to Rahfa and upon my arrival at Rahta, I told COL Huffman that the "hands off" position we were taking with respect to the refugees was not legitimate. I based this opinion on the basis that the fact that as the defacto occupiers of the portion of Iraq from which the refugees originated and were returned, and as leaders and members of the coalition, we were ultimately responsible to monitor and ensure Saudi ability and willingness to apply the Geneva Conventions. The forced movement of the refugees across international borders into danger was arguably a violation of the Geneva Convention relative to the protection of Civilian Persons in Time of War, 12 August 1949 (GC) art. 35 and 49.

6. This was the tip of the iceberg. The quality and ongoing nature of the GC violations was almost immediately objectively demonstrated by the fact that the Saudis had no idea of how many refugees were in the refugee camp. Further, in addition to the movement under duress, there was a general failure to comply with a long list of treaty obligations. These ongoing violations of the law of war were long known to us as a list of these deficiencies was generated early on and later passed to Saudi Arabian general officers by a U.S. general officer. COL. Huffman explained this to me during one of our many conversations wherein the refugees and repeatedly proposed an investigation into the improper way the refugees were being treated.

7. Receiving reports and observing (from the road) declining health and sanitary conditions in the refugee camp, longer water lines, hotter weather and surlier guards, and sanitary problems, I reported these deficiencies to COL Huffman. I specifically requested and was denied permission to enter the camp and gather more specific information on the conditions. I was ordered to stay three kilometers

away. Eventually, as a direct result of these GC violations, refugees, faced with a shortage of water, ran towards a Saudi water truck bringing water to the refugee camp and were massacred by Saudi forces. American MPs arrived at the scene and air medivac assets evacuated many of the dead and wounded. All U.S. soldiers present were ordered not to talk with reporters about the incident and the press was kept from the area. Apparently, some type of unholy alliance was in place where we wouldn't investigate the Saudis or meaningfully insist that they comply with the Geneva Conventions if they didn't ask us to get involved. Practically, we were attempting to disengage from an "Arab problem." Together, apparently, we successfully controlled media access and put the right public relations spin on our "humanitarian relief".

8. Upon hearing that we were to move the refugees to Saudi Arabia, I repeatedly informed the COL Huffman that the refugees needed to be processed (establish nationality, identify the sick, pregnant mothers, children without parents, underage children, etc.). My oft repeated point to my SJA was that we needed to take the high moral ground, take responsibility and show the Saudis that the GC demanded that we took its requirements seriously. I explained how this would be accomplished, that the refugees informed consent was required to transfer them to another country and that provisions were needed to allow their repatriation should they desire. I also repeatedly requested that an investigation into past abuses be conducted and that we just start doing things right.

9. Throughout the conflict, violations of the law of war resulted in the unnecessary suffering of many protected persons. I choose not to talk of most of these details at this time. Specifically, however, civilian refugees from portions of southern Iraq occupied by U.U. forces suffered greatly. In Rahfa, Saudi Arabiam as discussed below, after repeated attempts to induce my SJA, COL Walt

Huffman, to investigate and stop ongoing violations of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), I was forced to leap my Judge Advocate chain of command and speak personally with a Commanding General and his IG to whom I was temporarily "attached." In doing so I was forced to disregard my SJAs wishes and contradict his advice. We, as a nation obligated ourselves to turn refugees over to another signatory of the convention only if they were willing and able to comply with the GC. It was immediately obvious to anyone in Rahfa schooled in the Geneva Conventions that the Saudis did not even know what the convention required with respect to refugees.

10. Specifically, in April of 1991, in Rahfa, Saudi Arabia, after at least 3 attempts by myself to induce COL Huffman to recommend compliance with clear unambiguous and important provisions of the Geneva Convention. I complained to the 2AD (fwd) Commander BG Blackwell and his IG. I explained to BG Blackwell the need for the Prisoner of War Information Centers (PWIC) which were sitting idle just nort of KKMC, to process the refugees as required by the Geneva Conventions (BG Blackwell at that time professed to know nothing about PWICs thus substantiating my suspicions that the law as I explained it repeatedly to COL Huffman, was not being passed on to BG Blackwell). I also explained the need to allow and indeed subsidize repatriation, to obtain informed consent of those bing moved, to investigate past CG violations, and the special needs and protections for children. I offered BG Blackwell my copy of the Geneva Conventions and offered to show him each article I referred to as I explained his obligations under the convention. I put the book on his desk as I pointed out GC art. 148 because transferring the refugees to another country was a potential grave breach.

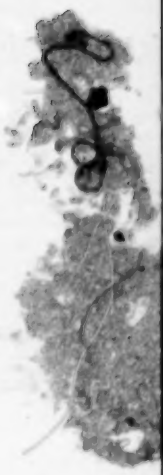
11. The point I was stressing was this: if we moved the refugees and the Saudis killed more, or even

merely allowed them to die, and we didn't processed them, it could really come back to haunt him later, even after he left Saudi. In response to my advice, BG Blackwell stated that COL Huffman had told him everything was OK and it was all right to move the refugees without additional processing. I told him I disagreed and he needed to call COL Huffman. BG Blackwell obviously did not like what I was telling him but I refused to modify my advice. As I left he thanked me for my advice and indicated he would call COL Huffman. Immediately upon leaving I called COL Huffman, told him BG Blackwell was a little upset and would be calling him. I then briefed COL Huffman on what I had told BG Blackwell. Instead of calling COL Huffman, BG Blackwell apparently called LTG Franks, Commander VII Corps. LTG Franks flew out the next day with COL Huffman. LTC Pearson told me that at a meeting the next day COL Huffman continued to disagree with my opinions. COL Huffman thereafter called me and chewed ne out in an extremely antagonistic manner, but acknowledged that I was correct on the law. My recommendations were ultimately followed by LTG Franks and BG Blackwell.

12. Prior to any of the above described conversations with BG Blackwell, based upon a brief conversation with the Chief of Staff 2d AD, I anticipated that the MPs were going to be given the mission to move the refugees into Saudi Arabia. For this reason I initiated a brainstorming session with the staff of the 793d MP BN in which at least the S1 and S2 and perhaps the S3 present. I specifically recall their hesitation at my suggestion that we plan for the movement of the refugees and comments such as: why? we have not even been given the mission yet! Nonetheless, the brainstorming began and continued in earnest when the battalion deputy entered the room and suggested the same thing, that we begin to plan for the movement of the refugees into Saudi.

13. During the session I gave the deputy (MAJ Knoblauch) a piece of paper with my concept of

how the evacuation could be accomplished with reasonable compliance with the Geneva Conventions. I recall that my notes (in much more cryptic notation) included at least the following:



a. A flow diagram suggesting how the transport vehicle should approach the refugee camp; traffic control and ground guides.

b. A discussion of how the different tribes, nationalities, religious groups and other homogenous groups with leaders should be identified, kept together and assigned loading points.

c. A methodology whereby the groups to be moved should be assigned distinctive markings and space at the new camp and how the corresponding transport vehicles should be marked. Analogies to signs in large parking lots were drawn.

d. A proposal that repatriation kits of food, water and gasoline, etc., be put together so that those who wished to repatriate themselves would have the items of logistical support to do so.

e. A chronological listing of requirements needed to ensure every person moved was being moved voluntarily. I put this in standard PLAN format indicating that on movement (M) day +4 all the leaders of the various groups should be briefed on the intended move and taken to the new camp where they would each be shown their new camp and given a pickup time and place. M+3 group leaders coordinate with their people and make sure everyone who wishes to leave can do so or make other arrangements. Reparation kits distributed. M+2 Parking lot signs are prepared and pick up sites and crowd control funnels etc. constructed. M+1 Vehicles prepared with food and water available, property etc. is assembled and that

children and property are not separated from owners, and alternate special transport etc. arranged for pregnant females, very young, aged and inform was orchestrated and M day. (A variation of this plan was presented to LTG Franks when he arrived after my discussion with BG Blackwell).

14. Having discussed the matter with the MP BN staff, I remained concerned about medical screening, the refugee processing which had not been accomplished and the safety of the entire operation. I thereafter expressed my concern to LTC Pearson. I recall telling him that I was glad I didn't have his job as the thought of some kid getting run over in the dust or falling off one of those dangerous flatbed tractor trailers with the removable sides, etc., "scared the hell out of me". Although receptive to my concerns with safety, he appeared unwilling or unable to address the problems I later brought to BG Blackwell. I then obtained his permission to speak with "the powers that be" at 2d AD. A few days earlier I had called COL Huffman to verify that the entire mission was responsibility, that I was the operation legal advisor and that there were no other 2d AD legal advisors or site or en route. As I approached BG Blackwell's office I spotted the newly appointed 2AD SJA, LTC Chapman, getting into a helicopter. I asked for his permission to speak with BG Blackwell about my legal concerns as they pertained to the refugees. He briefly gave me his consent and departed on his waiting helicopter.

15. About 5 or 6 days after my conversation with BG Blackwell the PWICs I suggested to BG Blackwell arrived by helicopter. Shortly thereafter additional refugees were flown in from other refugee camps and processed. People finally started acting as if the Geneva Conventions applied. This was consistent with what LTC Pearson had relayed to me prior to my undertaking the initiative for which COL Huffman retaliates; that LTG Frank's intent was to do things right; that the refugee task force was not a low budget operation. This was totally inconsistent with

the instructions I received from COL Huffman. BG Blackwell and his men did an incredible job. The delayed GC compliance I so "helpfully" sought and obtained appreciably delayed no one. No one would have been happier than I had we just done the job right in the first place.

16. I was forced to go over COL Huffman's head because he consistently failed to act upon impending or actual violations of the Geneva Conventions when I reported them to him. On 5 different occasions, starting in Germany, I reported the impending violation of the Geneva Conventions consequent to ignoring the need to make transportation available to evacuate enemy prisoners of war to the rear. Other problems such as the failure to take action to amend the ambiguous language in GO#1, which arguably purported to allow looting and the taking of souvenirs from prisoners of war, also frustrated mission accomplishment. The flaw in GO#1 caused great confusion and distraction to soldiers; it diverted soldiers from the mission at hand and forced me to constantly address the fact that the Geneva Conventions overrule GO#1 and that personal property, protective equipment, etc., could not be taken from prisoners of war. Simply stated GO#1 was inconsistent with Congressional and Executive intent as expressed in the Uniform Code of Military Justice art. 103.

17. At the conclusion of the ground war I told COL Huffman that many EPW had items of personal property removed from them and that they were entitled to some process and compensation for what they had been deprived. I do not believe we have corrected this injustice. In Germany, before deployment and in Saudi Arabia, prior to the war, in Saudi I provided COL Huffman with a proposed amendment to GO #1 to dispel the ambiguity and conform to the Geneva Conventions. Although memoranda were distributed through JA channels after I pointed

out the GO #1 problem, these memoranda were of no legal effect. The ambiguity endangered soldiers over looking for those novel (and often dangerous) "souvenirs", and greatly complicated the customs mission as we prepared to return VII Corps soldiers to Germany.

18. The Geneva Convention Relative to the Treatment of Prisoners of War (GPW), articles 19 and 20 contains the legal requirements with respect to evacuating EPW. We had ordered 100,000 capture tags for EPW, concluded an agreement to turn EPW over to the Saudi Arabians, yet planned on evacuating none in the face of clear military history and doctrine of using backhaul transport (vehicles returning from the front) to evacuate EPW. I pointed this out to COL Huffman 5 times, starting in Germany. He provided no assistance. EPW were stranded for weeks without shelter and the efficiency of the fighting divisions were hindered by unevacuated EPW. At planning sessions at KKMC prior to the inception of ground hostilities, I humbly and mildly offered NG Daniel Deputy VII Corps commander my opinion that the option he appeared to be favoring, walking the prisoners through the desert, sounded like a death march (we had no mean of logistically supporting such an operation), I was forced to express my personal disbelief at the MG Daniel's and 2d COSCOM representatives position that of the 20,000 odd trucks going forward on the offensive, and returning, that none would be available for backhaul of EPW. I prepared a memorandum for record and recommended that the MP brigade commander, COL Pomager, and other members of his staff do the same as our repeated requests for logistical support to accomplish this mission were denied.

19. Faced with the total denial of all backhaul transport, at the behest of my MP Bde Cdr, I commanded a task force of MPs who drove two buses from Log base Echo to the port and returned with 34 buses to accomplish evacuation of EPW. I trained MPs to drive buses, used my

technical training as an airframe and power plant mechanic to hotwire and build 34 operational buses from the 50 odd inoperative buses and safely convoyed back to Log base Echo.
During the ground war I flew to the front to guard prisoners and help organize the then highly inefficient (knee jerk) air evacuation process. I obtained a forklift and organized programs for tracking EPW holding areas and numbers, loading Chinook helicopters, cycling guards, food and water forward for EPWs as others were evacuated. I was the convoy commander and jumped the VII Corps' EPW cage into Iraq and helped safely evacuate many thousands of EPW by screening military vehicle drivers at roadblocks and asking them to report to their commanders that vehicles to accomplish EPW evacuation were desperately needed. The entire process was much more dangerous than it needed to be. Commanders with excess or unused transport capacity thereafter reported to the EPW cell oaf which I was a member, at the Corps cage in Iraq on an almost daily basis. Evacuation was accomplished in large part by an unheralded "volunteer" theater reserve truck company otherwise doing nothing as they waited to begin their assigned Kuwaiti relief mission.

20. For my efforts to reduce unnecessary suffering and comply with the Geneva Convention I faced many dilemmas. I was, at various times, ordered by other superior officers (not in my chain of command) to return the buses and bottled water I obtained to accomplish the mission. My MP superiors overruled them. On the battlefield, despite the plain words of the OPORDER, EPWs were to receive neither bottled water nor air medivac, in addition to the deliberate denial of backhaul. Such orders deprived individual commanders of soldiers in the field the ability to personally and individually comply with the Geneva Conventions. Whatever happened to good old American idealism? Do we no longer even desire to occupy the high moral ground? As late as late June, I was being called in

Germany and asked to account for buses. Throughout the war I combed battlefields looking for broken down buses, suffering under the threat of paying for the buses I had to sign for to accomplish the mission. (The S1 refused to sign for them when I picked them up.)

21. I am fully aware that we all must carry out orders and did so at all times. Where doing so results in violations of the law of war and international treaties however one must modify the means of executing one's orders as to comply with the law. Information, legal advice and knowledge of the CG were being withheld from a general officer by the legal advisor of a superior commander. Information which he needed to do the proper, lawful and humane thing.

22. While in Rahfa I was painfully aware than an armed conflict was recently concluded, that human life has reduced in value in Southwest Asia and that the U.S. presence in Southern Iraq did not meet all the classic elements of a belligerent occupation. This changed neither the Geneva Conventions' status as the paramount law nor the refugees' status as protected persons. It is fundamental that our presence in that area was transitory and we did not want to displace or antagonize the Saudi government. However, GC art. 45 allowed us to turn over refugees to another signatory to the GC only if they were willing and able to apply the conventions. I saw that this was not happening upon my arrival. With that knowledge came the responsibility to seek corrective action.

23. I know that some of these facts resulted from top driven command decisions to accept risk in given areas based upon limited assets. There was a war to win and my SJA too, was taking orders. We had no obligation to do anything which compromised our ability to obtain a speedy and successful conclusion to the war. No one expected the war to be over so quickly. The supply trains and logistical tails were all uploaded to allow the forward momentum to be

maintained. I understood all this and I made do with what I could get. I point out the earlier problems I dealt with during the war, at the risk of sounding like a malcontent, to make a point. I did not usurp my chain of command out of fear for personal danger or some "arguable" violation of the spirit and intent of the Geneva Conventions. I intend no disrespect for COL Huffman by these accounts. However, what I saw was real and truly unnecessary suffering.

24. It was very obvious that the plans and policies we were implementing were made echelons above our level. I was intimately acquainted with the limited nature of logistical and other classes of support. I had worked these issues for the preceding 5 months with respect to EPW. The situation was much better than during the war when they were never so bad that we couldn't at least substantially comply with the law. Commanders are always willing, if not happy, to do what the law required. It was the desire of JAs to forget the law so as to maximize their personal "helpfulness" which conspired to leave commanders without legal advice at critical times. I grew tired of seeing good soldiers, innocent (protected) people and the United States endangered.

25. The people on the ground are the people best able to assess the impact and provide higher headquarters with feedback and informed legal opinions as to whether any given plan could be accomplished without violating the law of war. I called the VII Corps SJA and repeatedly begged him to advocate that we undertake compliance with the GC through command channels. Faced with his continued emphasis upon "not getting involved" and "getting out of here", and, because I had raised my right hand and swore to uphold the law and the rules of ethics, I was left with no alternative but to go over his head to the Commanding General, 2AD, BG Blackwell and the IG if the 2d AD. To both persons I reported the violations of the Geneva Conventions described herein. I do not recall the name of the 2AD IG but he was a major and resided

in the last room on the right as you face the Rahfa airport terminal.

26. My tour as a command judge advocate was "successfully" concluded (I accomplished my assigned missions). Throughout the conflict, I did not know who my rating chain was. I was, based upon the retention of total and unabridged assignment discretion by the VII Corps SJA, subject always to his priorities. I did not find out who my rater or senior rater was until mid-March, long after the war was over. My eventual rater, LTC Warren, can attest to this. I was constantly caught between my brigade commander, COL Pomager, and the VII Corps SJA, each of them wanted me to do different work. From almost the day of my arrival in the theater, I was exposed to conflicting resentments as COL Huffman attempted, for example, to give me broad claims responsibility, encouraged me to develop a corps-wide EPW disciplinary procedure, encouraged me to address developing enemy grave registration problems and to establish a corps confinement facility – all in direct conflict with my brigade commander's priorities and intent to use me as an S3 action officer. Even as he caused me these difficulties with his demands which conflicted with my brigade commander's intent, COL Huffman counseled me for the conflicts and troubles he caused. He also falsely accused me of abandoning a Saudi EPW evacuation bus on pipeline road with absolutely no investigation or knowledge of the facts. I enclose a cross section of some of the written work I accomplished while in Saudi at Appendix A.

27. I did not learn of the retaliation to which I am subject to until the end of the third week in October 1991, when I was given my end of my Germany tour ARCOM, and received a copy of my micro fisch from DA. It was then that I realized that my two block rating was substantially below center of mass. My senior rater's profile was 6 in the one block and 4 in the two block. I had written earlier for my Microfiche and the OER at issue, Exhibit B was not

in the fiche I received in September. Over 75% of VII Corps JA who were in Saudi received bronze stars. My SJA sought to have me hailed in front of my classmates in school (who also received bronze stars and MSMs) and read an ARCOM with some of the standard form laudatory language normally befitting an ARCOM, conspicuously absent. He also retaliated against me by killing me with faint praise in the comments portion of my OER and then libeling my professionalism and judgment in his senior rater commentary by stating my efficiency is compromised by an "excess of zeal". All I did was follow orders and counsel compliance with the law.

28. Further, after our return from Saudi Arabia, COL Huffman retaliated against me by actively preventing the processing of an award of a meritorious service medal to me for my end of tour award at the conclusion of my second tour in Germany. While I was in Saudi, my OIC from Germany, MAJ John Hoffman, told me that he had spoken to my last senior rater and the then VII Corps SJA (Germany) LTC Frothingham, and that it was decided that a MSM was the appropriate award for my end tour award in Germany. After COL Huffman returned, MAJ Hoffman was ordered to not even submit a recommendation for my end of tour award and when he questioned and sought to recommend me for an MSM was told to "mind his own business".

29. COL Huffman has taken his retaliation to its ultimate extreme: bronze stars for 90% of the VII Corps lawyers who worked with him at air conditioned hard sites doing the normal paper shuffle. For those that left the hard site, bronze stars despite the fact that they ignored their responsibility to learn and counsel compliance with the Geneva Conventions. For me, who had to deal with all the people and problems they refused to address, nothing. I have been a soldier for a long time. Skipping my chain of command and going to the IG or BG Blackwell was contrary to everything I wanted to believe. Ethically, I could not sit by and

let it go on. Based upon the way the Saudis were treating the refugees, even in our presence, I knew it was unconscionable and illegal for the U.S. to leave them or move them, as had the Saudis, in a nameless, faceless, unnumbered and unwelcome mass, into miserable, Godforsaken, uninhabited stretch of Saudi Arabian desert, without complying with numerous critical requirements of the GC. We simply could not condone or participate in doing things wrong. As I once told COL Huffman: "Someone has to take care of BG Blackwell". I did what ethics required of me.

30. The Geneva Conventions require that civilian refugees be accounted for and protected. The law of war requires that countries act reasonably in safeguarding the health and property of protected persons. I can only attribute the unnecessary suffering, human rights abuses and deprivation of property to counter productive, institutionally induced, rationalization processes. These lapses of GC enforcement befit either the United States, the Judge Advocate's Corps not the solemn promises made by the U.S. people in treaties. Even a refugee is entitled to the protection of the law. I was ethically, morally and legally obligated to take these violations to my superiors and the IG. After the 2d AD Commander was acquainted with the requirements of the GC, it was possible to reasonably comply with the GC in only a few days.

31. The war presented difficult situations and everyone was under stress. The law was clear, the fighting and time to balance the need to adhere to the letter of our treaty obligations based upon military necessities was long past. Any reasonable man would have arrived at the same conclusion. I found commanders wanted to comply with the laws of war when practical, reasonable and military necessities allowed. All that was required is that they be informed of their obligations and not "helped" by not being told things they didn't want to hear.

32. I find myself terribly distracted at my present duty assignment at the JAG School. My studies are marred by these events. I respectfully request that an investigation be conducted and that I be given the opportunity to be heard and to provide you with additional facts and/or witnesses to establish my entitlement to protection. Finally, I request that the conditions of the refugees left near Rahfa, Saudi Arabia, be investigated to ensure their safety and continued compliance with the GC, UP GC art. 6. by the Saudi government.

(Signed)Paul D. Kerian
CPT, JA
Graduate Student
(Home) Tel. 804-295-9929

APPENDIX F

MILITARY WHISTLEBLOWER REPRISAL INVESTIGATION:
CAPTAIN PAUL D. KERIAN. JAG, UNITED STATES ARMY

1. Name of Examining Official: David M. Hergenroeder
2. Rank of Official: Major
3. Duty Position and Telephone Number: Detailed Inspector General, Investigations Branch, Office of the Inspector General, Headquarters, USAREUR/7A; ETS: 370-6221/8769
4. Organization: Office of the Inspector General; U.S. Army, Europe APO AE 09403-0110
5. IG, DOD, Control No: H91L49966
6. Introduction:

The investigation was undertaken in response to allegations by Captain Paul Kerian, that

reprisal actions had been taken against him as a result of a disclosure to an Inspector General. In a written complaint to the Inspector General, Department of Army, dated November 20, 1991, subsequently processed through the Inspector General, Department of Defense, Captain Kerian requested an investigation under 10 U.S.C. Section 1034, alleging he was subjected to multiple instances of reprisal after disclosing alleged Geneva Convention violations which occurred in Southwest Asia within the VII Corps area of responsibility. This action was referred to the Department of the Army Inspector General (DAIG) on December 23, 1991. The DAIG tasked the United States Army, Europe, Inspector General (USAREUR-IG) on January 28, 1992, to inquire into the allegation of reprisal for making a protected disclosure under the Military Whistleblower Protection Act.

7. Background:

Captain Kerian was the Judge Advocate for the 14th Military Police Brigade, VII Corps, for Operation Desert Shield/Storm during the period December 1990 through May 1991. He was involved in the planning, training, and conduct of enemy prisoner of war and civilian refugee actions within the VII Corps area of responsibility and normal legal services. He alleged that he suffered reprisal action at the hand of his senior rater in the form of a substandard evaluation report, denial of an appropriate award for his Desert Shield/Storm service and end-of-tour award for having contacted an inspector general concerning alleged Geneva Convention violations.

8. Scope:

Pursuant to the Inspector General Act of 1978 (as amended by Public Law 97-252), the Inspector General (IG), Department of Defense (DoD), is responsible for improving the economy, efficiency and effectiveness of the Department's operations through prevention and detection of fraud, waste and mismanagement. To fulfill those responsibilities, Congress has granted the IG, DoD, broad

powers to conduct and supervise investigations relating to the Department's programs and operations.

In 1988 Congress enacted Public Law 100-456 (codified at Section 1034, Title 10, U.S.C.), which further expanded the investigative responsibilities of the IG, DoD. The statute requires the IG, DoD, to investigate allegations of individuals taking unfavorable personnel actions or withholding favorable personnel actions as reprisal against a member of the Armed Forces for communicating with a Member of Congress or an IG concerning: (a) violation of law or regulation, or (b) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety. On completion of the investigation, the IG, DoD, is required to report the findings to the Secretary of Defense and the military member concerned. The DoD Directive 7050.6, "Military Whistleblower Protection," dated November 20, 1989, implements Section 1034 of Title 10, U.S.C. (as amended).

In investigating the allegations of reprisal, the following issues must be considered:

A. Did the complainant make a disclosure protected by statute?

B. Subsequently, was an unfavorable personnel action taken or was a favorable action withheld?

C. Did the official(s) responsible for taking or withholding the personnel action know about the protected disclosure?

D. Does the evidence establish that the personnel action would have been taken if the protected disclosure had not been made?

We obtained testimony from nine personnel knowledgeable with the alleged incident and the VII Corps mission. These interviews included each of the officials involved in the evaluation report and the two award recommendations (Desert Storm and end-of-tour). Separate inquiries were conducted into the allegations concerning violations of the Geneva Convention and lawyer professional competence. The results of those

inquiries will be provided directly to Captain Kerian. No further actions are anticipated by this office.

9. Findings:

A. Did Captain Kerian make a disclosure protected by statute? We found that although Captain Kerian did talk to an IG while in Rafha, he did not make any disclosures protected by statute.

Captain Kerian alleged that he spoke to the Inspector General, 2nd Armored Division (Forward) in Rafha and made a complaint about the treatment of refugees under the Geneva Convention. He further claimed that although he did not remember the date or the name of the inspector general (IG), the IG was white, a major, and they had met outside the IG's billets. Captain Kerian further stated that he thought the Staff Judge Advocate, 2nd Armored Division (Forward) was present for the conversation. Captain Kerian stated that there were no other conversations with any other IGs while he was in Southwest Asia.

Major John W. Talbot, Inspector General, 2nd Armored Division (Forward), stated that he remembered meeting Captain Kerian once in the hall outside his billets in Rafha. He said they were introduced by Captain Max D. Lederer, Staff Judge Advocate, 2nd Armored Division (Forward), who was present for the entire conversation. Major Talbot did not remember the exact date of the conversation, but thought it was possibly the first day Captain Kerian was in Rafha. Major Talbot stated that Captain Kerian did not make a complaint, or talk about any problems he was having. He stated the conversation was very general in nature, consisting of chit-chat about living conditions in Rafha, how the war had gone, how long they had been in the desert, etc. Major Talbot stated he was aware through second or third-hand information that Captain Kerian and the Commanding General, 2nd Armored Division (Forward) had words about the Geneva Convention and that Captain Kerian had told the Commanding General that he would go to jail unless he followed Captain Kerian's advice. Major Talbot concluded by stating that he

did not talk with, nor did he receive any communication from Captain Kerian at a later time.

Captain Lederer, the former Staff Judge Advocate, 2nd Armored Division (Forward), confirmed that he had been present for the conversation described by Major Talbot and Captain Kerian. Captain Lederer verified Major Talbot's version of the conversation. He stated that he did not remember any business being discussed during the conversation. He further stated that he was unaware if Captain Kerian ever talked with Major Talbot at any other time.

Captain Kerian alleged that the only other time he had talked to an IG was when he discussed his complaint with an IG at Department of the Army, Inspector General Agency after he submitted his November 20, 1991, letter requesting an investigation under the provisions of the Military Whistleblower Protection Act.

B. Subsequent to the disclosure, was an unfavorable personnel action taken (or threatened to be taken) or was a favorable action withheld (or threatened to be withheld)? Captain Kerian received what he believed to be a substandard officer evaluation report. Additionally, he felt he deserved a higher Desert Storm service award and a higher end-of-tour award.

Captain Kerian alleged that he received a substandard evaluation report with a below center of mass rating and an Army Commendation Medal (ARCOM) award, rather than the higher-Meritorious Service Medal (MSM), as an end-of-tour award in reprisal for vocalizing his concerns about alleged Geneva Convention violations while in Southwest Asia.

Captain Kerian received a "two block" from his senior rater. Colonel Walter B. Huffman. Colonel Huffman's senior rater profile used only the first two blocks. He had six people in the first block and four people in the second block. Colonel Huffman's senior rater comments included the statement, "On occasion, Paul's effectiveness is hurt by overzealousness, but overall

he was an excellent Brigade JA who made an immense contribution." Review by personnel from the local 379th Personnel Services Company determined that the evaluation report was not a derogatory report by the letter of the regulation and there was no requirement to treat it as a referred report.

Colonel Huffman stated he rated Captain Kerian solely on his demonstrated duty performance. Captain Kerian was almost relieved by the Commander, 14th Military Police Brigade. Additionally, Colonel Huffman said that Captain Kerian caused more management problems than any other officer in the desert. Colonel Huffman felt he had an obligation to accurately reflect Captain Kerian's duty performance in his senior rater comments and rating.

An interview with the former Commander, 14th Military Police Brigade, confirmed that he almost relieved Captain Kerian while in Southwest Asia. He stated that Captain Kerian wanted things done his way, and no other way would do. He stated Captain Kerian briefed everyone who would listen about how he felt operations should occur. The commander further stated Captain Kerian almost caused an international incident over the Saudi treatment of refugees and his insistence that he be allowed to inspect the Saudi operation. Captain Kerian's former commander stated that because of this type of behavior, he would have rated him well below the rest of his officer's, with a comment questioning Captain Kerian's potential for further service.

The VII Corps Judge Advocate stated personnel who were not in supervisory positions were usually recommended for and received ARCOM's, while personnel in supervisory positions usually were recommended for and received MSMs. Captain Kerian was not an officer-in-charge of a section placing him in a supervisory position. Major John B. Hoffman, Officer-in-Charge, Heilbronn Legal Center recommended Captain Kerian for a MSM as his end-of-tour award. Colonel Huffman, in his position as the VII Corps Judge Advocate, had the authority and responsibility to make his recommendation on this award request

prior to final action at Corps Headquarters. It was his recommendation that Captain Kerian receive an ARCOM. This recommendation was based on Colonel Huffman's personal knowledge of Captain Kerian's entire tour performance, including the fact that Captain Kerian had to be reassigned twice based on personality conflicts. VII Corps approved Captain Kerian for an ARCOM for his end-of-tour award. This action was based on demonstrated duty performance and not in reprisal for having contacted an inspector general.

C. Did the official(s) responsible for taking or withholding the personnel action know about the protected disclosure? Captain Kerian stated he never told Colonel Huffman that he had talked to an inspector general. Colonel Huffman stated that he first became aware Captain Kerian had gone to an inspector general sometime in January 1992. He did not know that Captain Kerian had talked to an IG in Southwest Asia when he wrote Captain Kerian's evaluation report and made his end-of-tour award recommendation.

D. Does the evidence establish that the favorable personnel action would have been taken or that the unfavorable personnel action would not have been taken if the protected disclosure had not been made? The evidence establishes that these personnel actions would have been taken absent the communication with an IG.

Based on the information provided to the first three questions. Colonel Huffman made his decisions based on demonstrated duty performance without any prior knowledge that Captain Kerian had communicated with an IG. There was no protected disclosure.

Captain Kerian is advised to submit an appeal to this officer evaluation report if he feels there are substantive administrative errors or that the description of his duty performance is inaccurately stated. A check with the Officer Appeals Branch at Total Army Personnel Command revealed that no appeal has been submitted to date.

10. Conclusion:

The allegation of reprisal was not substantiated. We found no evidence that Captain Kerian's substandard evaluation report, his Operation Desert Storm award or his end-of tour-award were influenced or occurred as a result of his alleged whistleblowing activities.

11. Security Classification of Information:

This inspector general report contains privileged information and will be protected in accordance with the provisions of Army Regulation 20-1. Specifically, dissemination of the report will be restricted to the absolute minimum consistent with the effective management of the internal affairs of the Army. Dissemination of any portion of the report will not be made without specific permission of The Inspector General, Department of the Army.

12. Exhibits: See attached list.

13. Location of Field Working Papers and Files:

Office of the Inspector General, ATTN: AEAIG, U.S. Army, Europe and Department of the Army Inspector General Agency, ATTN: SAIG-AC, Pentagon, l-D-736, Washington, D.C. 20310-1738.

DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C. 20310-1700

List of Exhibits

Tab #	Description
1	Summary of Interview with Captain Paul D. Kerian, dtd 14 February 1992, with copy of original 20 November 1991, memorandum requesting an investigation under the Military Whistleblower Protection.
2	**Summary and Identity of witness withheld**
3	**Summary and Identity of witness withheld**
4	**Summary and Identity of witness withheld**

5 Summary of Interview with LTC Frothingham, Judge Advocate, VII Corps, dtd 5 February 1992.

6 **Summary and Identity of witness withheld**

7 Summary of Interview with LTC Chapman, Judge Advocate, 2nd Armored Division (Forward), dtd 4 February 1992.

8 **Summary and Identity of witness withheld**

9 Summary of Interview with Captain Max Lederer Jr., OIC Bremerhaven Legal Center, former SJA 2 AD (Fwd), dtd 3 March 1992.

10 Summary of Interview with CW4 Aquirve, Personnel Information Branch, 379th PSC.

11 Captain Kerian's OER for the period 890701 - 900605.

12 Captain Kerian's OER for the period 900606 - 901205.

13 Captain Kerian's OER for the period 901206 - 910512.

Summary of Interview with CPT Paul D. Kerian
JAG School UVA, 14 February 1992

Told him IG,,USAREUR, has letter and is working case.

What IG did you talk to? 2AD (FWD) IG, white, male Major. Didn't remember name. Talked to him outside his billets.

Addressed policy position, medical screening requirements. After planning stages into refugee operations.

When? About same time as I talked to CG (BG Blackwell) Didn't remember exact time. Addressed policy issues, and medical screening requirements. Only once? Also talked to COL Lagrua, DAIG about packet I sent to DAIG..

Did COL Huffman know you went to IG? "He knew I talked to CG. I didn't tell him I talked to IG."

We have letter, pretty thorough, anything to add to it?

2 separate packets sent. First to TJAG. Then, when no response, one to DAIG.

"Everyone wanted to believe that we were not an occupying power and had no legal obligation in the matter." Guidance from COL Huffman or higher.

"Problem was, I guess, GEN Schwarzkopf and Saudi's had an agreement that the Americans were not going to do that (handle refugees); the Saudi's would."

Things were not getting done "right." But I don't really blame GEN Schwarzkopf. Not sure he was getting good legal advice."

Were told they were not occupying powers.

US position seemed to be "were not staying long," lets pull up stakes and get out."

Asked if people were denying it happened. Stated factual data shouldn't be hard to verify.

There were meetings between GEN Chambers, GEN Blackwell, COL Huffman, and LTC Pierson.

The MP's in his battalion did things right finally.
Not sure who gave legal advice to 2AD (FWD).
They had good intentions but "misguided."
Couldn't get compliance from LTC Pearson, MP Battalion Commander.
Problems during planning phase before OPIAN,

Had to go to BG Blackwell to resolve issues after OPORD written.

Couldn't inspect refugee camps because they were under Saudi control. Told to stay away from camps.

Basic problem:
"We didn't know what the intentions of the Saudi's were toward these people. In a perfect world we would get written intent from each person before transferring them to the Saudi's and a written intent from the Saudi's to protect each person transferred." Went to IG after 2AD (FWD) not doing that and keeping that paper work. No one was accounting for refugees. CPT Kerian was in on planning stages as staff officer.

Talked to LTC Pearson.

Talked to COL Huffman. Said it was difference of legal opinion -but not explanation/rational given.

Bottom line "I got the minimum taken care of."

ARCOM vs MSM doesn't know how decision was made but thought it was reprisal.

Didn't get Bronze Star thought he should have. Did as much as others.

Raised issue how because he "just didn't think it was right what ; we did over there."

Summary of Interview with LTC Frothingham
JA, VII Corps, 5 February 1992

5 Feb 92:

Asked for rater and senior rater of CPT Kerian.
Before going to SWA:
Rater: MAJ John Huffman - Heilbronn Legal Center.
Senior Rater: LTC Frothingham.
Last OER - Change of Duty ended Dec 90.
In Desert: Senior rater - COL Huffman.
Rated by Deputy Commander, 14th MP Bde.

He senior rated Kevin. Game center of mass rating. 2 block.

Knowledge of end-of-tour award. Break out decided by duty position level of responsibility/supervision. Has a matrix to try to ensure things are kept pretty even. Exceptions at both ends. Does not consider CPT Kerian an exception. Majority of CPT's who were sent QIC's got ARCOM.

Asked about working for COL Huffman. He was not the type to hold "legal interpretation differences" against a person. Does not recall any uneven actions directed against any officer. For awards he stacked performance of all the officers up against others of same rank

Heard rumors of CPT Kerian having problems in SWA. Almost got relieved from 14th MP Bde. Stuck it out, but had problems.

27 Feb 92: Got phone number for COL Huffman, JA CENCOM.

3 Mar 92: Asked about what guidance VII Corps got or put out reference refugees. Didn't know would try to find out.

Summary of Interview with LTC Chapman, Judge Advocate, 2d Armored Division (Fwd) on 4 February 1992

Knew CPT Kerian; was with him in 14th Military Police Brigade.

Did not rate him. No one in 2AD(Fwd) rated him.

Rated by VII Corps SJA - LTC Frothingham.

Senior rated by COL Huffman - now at McDill AFB.

Who was SJA, 2AD during the Rhafa?

I was during last period for 2AD. By the time I got there, Rhafa was over.

Was U.S. an occupying power? "Don't know if that was ever resolved. Know it was raised to the Corps level. We talked about that a lot. Don't know what the final official status was."

Summary of Interview with CPT Max Lederer, Jr.
OIC Bremerhaven Legal Center, former SJA (FWD), on 3 March 1992

Interview conducted by MAJ Hergenroeder, Investigator, Office of the Inspector General, USAREUR/7A

Confirmed he was SJA 2AD (FWD) in SWA.

He knew both MAJ Talbot and CPT Kerian.

Recalls introducing CPT Kerian to MAJ Talbot in Rhafa. Was end of April or beginning of May in hall outside billets

Talked about general topics; living conditions, how long they'd been in country, what he did in war, etc.

When asked if CPT Kerian presented an IG complaint, CPT Lederer stated "No, don't remember any business being discussed."

Did not know if CPT Kerian talked with MAJ Talbot on any other occasion. MAJ Talbot never mentioned it.

Stated there were no other IG's at Rhafa that he knew of.

Asked if he heard of any refugee/EPW problems. He had heard rumors of possible problems like transporting refugees in open HEMETS. However, when he looked into it he found that was not occurring.

Summary of Interview with CW4 Aquirre
Personnel Information Branch, 379th PSC

Read OER.

Not Adverse.

Would not have been referred.

DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, DC 20310-1700

December 11, 1992

Assistance Division

Captain Paul D. Kerian
HQ, US Army Test and Evaluation Command
ATTN: AMSTE-JA
Aberdeen Proving Grounds, MD 21005-5055

Dear Captain Kerian:

This letter is in response to your November 20, 1991, letter to the Department of the Army Inspector General concerning the alleged failure of the 14th Military Police Brigade to fully comply with certain provisions of the Geneva Conventions.

A thorough review was conducted into the allegation you presented. Our inquiry failed to reveal any violations of the Law of War. The attached enclosure provides answers to the questions you raised regarding the rules for the care and handling of refugees in Southern Iraq during Operation Desert Storm.

I apologize that this response has taken so long to complete. Your concern in this matter is appreciated and although you might not agree with our finding you can be assured that the allegation was thoroughly

researched. I trust the information provided is responsive to your request for assistance. No further action is anticipated by this office.

Sincerely,

(Signature)

Alan R. Paczkowski

Colonel, Inspector General

Chief, Assistance Division

Encl
as

Answers to questions regarding the rules for the care and handling of refugees in Southern Iraq during Operation Desert Storm.

1. Were the US armed forces an occupying power in Southern Iraq during the time period from late February 1991 through the later part of March 1991?

Answer: Under the law of war, US forces were an occupying power in areas of southern Iraq

physically controlled by US forces. However, the territory occupied by US forces generally was uninhabited desert. Absent the presence of an enemy civilian population, the full range of responsibilities set forth in Hague Convention IV of 1907 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 were not triggered. US forces did not enter Iraq with the mission or intent of establishing a government in lieu of the existing Government of Iraq. Indeed, US forces were under instructions following the cease-fire to be prepared to withdraw from Iraq on short notice. Sincere there were generally no Iraqi civilians present within the occupied territory that required the services of the Government of Iraq, there were no civilians to whom an occupying power was obligated to provide such services.

Iraqi civilians displaced by the internal fighting between Iraqi military forced and the Shi'ite minority began to enter the territory occupied by US forces following the cessation of active hostilities between Coalition and Iraqi forces. As an occupying power, US forces had the legal right to deny these displaced civilian's access to the occupied territory. As a humanitarian gesture, however, the displaced civilians were allowed to enter the occupied territory, where they were treated as refugees and provided (within the capabilities of the forward deployed units, and consistent with the military mission) food, water, the medical care necessary for their survival; a camp was established for their care in southern Iraq, within the territory occupied by US forces. This degree of care these displaced persons were placed under no constraints as to their movement, that is, they were free to depart the area occupied by US forces at any time. They were neither civilian internees nor detainees as those terms are used in the Geneva Convention of 1949.

Assistance from international humanitarian agencies and organizations, such ass the International Committee of the Red Cross (CRC) and the United Nations

High Commissioner for Refugees (UNHCR) was sought but not obtained during the brief period of US occupation of southern Iraq. This issue was not resolved until April 5, 1991, when UN Security Council Resolution 688 provided that humanitarian organizations had the right of immediate access to Iraqi citizens who were victims of repression inside Iraq itself.

On withdrawal from Iraq, US legal obligations under the Geneva Convention of 1949 towards these displaced persons ceased. Individual or mass forcible transfers of displaced civilians from Iraq to Saudi Arabia by the US as an occupying power was expressly prohibited by Article 49, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.

2. What agreements are made by the US with the Saudi Arabian Government regarding the handling of refugees?

Answer: There were no formal agreements made between the US and the Saudi Arabian Government (SAG), concerning displaced persons or refugees, Issues relating to refugees within Saudi Arabia are subject to SAG sovereign rights rather than any US/SAG agreement.

3. What had been agreed to by the US and SAG regarding who would report the numbers and types of refugees?

Answer: There were no agreements between US and SAG regarding refugee accountability as to Iraqi refugees who fled Iraq of their own volition. Since these individuals were treated as displaced persons by US forces occupying a portion of southern Iraq, they never were in US custody as such, and there was no obligation for an accounting for persons simply because they were provided food and water. US forces provided airlift for refugees desiring to leave Iraq to the SAG camp. As a matter of practice, the US government made an accounting to the ICRC for all

refugees transported to Saudi Arabia. However, this accounting was not required to be as detailed as the US accounting for Iraqi prisoners of war.

4. Did anyone inspect the Saudi refugee camps?

answer: At the time the SAG refuge camps were built, US military and Coalition officials had access to the camps because the Department of Defense assisted in construction and setup. Following their construction, US officials had no right of inspection under international law. However, US military personnel had informal access. The ICRC also was given access to the camps by SAG, and reported through ICRC channels to the United Nations and US State Department.

APPENDIX F

PAUL D. KERIAN

P.O. Box 176 Darlington,
MD 21034 (410) 457-4835

November 30, 1993

MEMORANDUM FOR Commander, USTAPC, ATTN: TAPC-MSE-A, 200 Stovall Street, Alexandria, VA 22332-0442

SUBJECT: OER Appeal of Paul D. Kerian, 475-70-7412, P.O. Box 176, Darlington, MD 21034, Tel. # (410) 457-4835, released from active duty 25 Feb 93, after being passed over for promotion to MAJOR
(2nd Priority Appeal)

1. Under the provisions of Chapter 9, AR 623-105, on the basis of both administrative error, and substantive error (unjust evaluation), I appeal the OER given me for my active duty military service between December 1990 and May 1991. I request that the senior rater portion of this OER be rewritten, conforming the negative language (highlighted in yellow) on the attached copy of my OER (Encl A), to the language of my rater who actually monitored my performance. Further, I ask that my numerical senior rating be elevated to the 1st block and that my entire military record be referred to a "relook" promotion

board. The administrative error is simple and described in paragraph 2.

2. The person who senior rated me on my OER was not my Senior Rater. Proof of this administrative error is contained in the sworn statement of my rater located at Encl. B. You may also verify this fact when you contact COL Huffman or by contacting Major Gibbs. Major Gibbs' award recommendation is at Encl. C. Major Gibbs is a third party. On or about 20 April, 1991, my rater, LTC Warren, presented her completed rater portion of my OER to COL Pomager, my Brigade Commander and Senior Rater. COL Pomager refused to rate me. By default, COL Huffman, the Corps' SJA who knew relatively very little of my work and never expected to senior rate me, became my senior rater. Thus, my senior rating is administratively deficient. The events which motivated COL Pomager to refuse to senior rate me are discussed in paragraph 4. Subsequent paragraphs detail facts and circumstances giving rise to the substantively erroneous senior rating.

3. The substantive (fairness) portion of my appeal can be summarized in the following manner: I am an American military officer who believes in the rule of law. It was my misfortune to work for two "career sensitive" senior O6s, COL Huffman and COL Pomager, who were willing to rationalize illegality intended to minimize the immense contribution these two fine gentlemen and senior officers made to the war effort, or question their competency under normal, less stressful circumstances. To the extent my perspective differed from that of COL Huffman or COL Pomager can be explained in the following manner: I was at the front, personally observing the facts and circumstances, working with the soldiers and officers who were accomplishing the missions. They remained at the rear; drawing conclusions influenced by their personal agendas, and filtered "characterizations" of facts.

4. COL Pomager, my Commander and assigned Senior Rater, refused to rate me because, among other reasons, I discovered and reported to CID evidence of an improper and illegal course of conduct involving him and his command, the 14th MP Bde. I suspected the misconduct involved COL Pomager in at least (storing contraband captured weapons and/or hiding the misappropriation of captured Iraqi weaponry) i.e. misprision of a felony. These weapons were wrongfully possessed by the 14th MP Bde with the knowledge of COL Pomager who kept all information regarding the possession of these weapons from me, the Brigade Judge Advocate. I believe he kept the information from me because he knew I was a straight shooter who even-handedly followed the law and would have reported the matter to the CG as required. IF COL Pomager obtained a legal opinion which approved of the possession of such weapons, he must have gone elsewhere for the legal opinion. When I learned of this cache of illegal arms, I made a lengthy statement to CID. Because COL Pomager was the Provost Marshall, this CID report, including my statement, was available to COL Pomager.

5. Throughout Operations Desert Shield and Desert Storm, I performed under the normal rating chain of a Command Judge Advocate of an MP Brigade. COL Huffman was never in this rating chain and the possibility of his becoming my senior rater was never considered or discussed until LTC Warren finished drafting my OER in April. At about the same time, shortly after I reported the illegal weapons dealings by 14th MP Bde personnel, I was suddenly moved to assume duties as the on-site legal advisor to the refugee security mission inherited by VII Corps from the XVIII Airborne Corps (as the XVIII Corps departed theater from their positions on the western flank) in South Central Iraq. The refugee mission was assumed by the 2d Armored Division (fwd), and included military police forces of the 14th MP Bde. The refugee related work consisted of constructing refugee camps, moving refugees, and

protecting refugees from Iraqi forces. At the time of my reassignment to on-site legal advisor for 2AD, I was specifically made responsible by COL Hoffman for the legalities of the refugee mission. I was introduced to LTG Franks and the 2AD staff as the Geneva Conventions expert. This additional duty assignment is not reflected on my OER. This constitutes an additional administrative error. I was denied credit for wartime service as an Acting SJA (fwd) of an Armored Division.

6. Within a couple of days of my arrival at Rahfa, I had observed enough of the joint Saudi Arabian/U.S. refugee mission to be sure it was not being carried out consistent with the Geneva Conventions. When I told this to COL Huffman he repeatedly told me to: "let it go" and that: "we were leaving." COL Huffman did not take action, as mandated by law, upon the Geneva Conventions violations I reported. Instead, he ordered me to stay 3 kilometers away from the refugee camp we were guarding. The Saudis continued to maltreat the refugees who, with inadequate water supplies in incredible heat, bolted for a late-arriving water truck and were slaughtered (machine gunned) by the Saudis. All news of this massacre was covered up by controlling the access of the press, and gag orders placed upon American solders/witnesses.

7. The Allied forces (Saudi Arabian) non-compliance with the Geneva Conventions was being participated in by American forces. American forces were aware of earlier coercive deprivation of life sustaining food and water from refugees and the intent to abandon them in the desert. The expedient of denying refugees food and water in Saudi Arabia and forcing them into American Iraq was earlier employed with American knowledge and consent. The Saudi government did not occupy that part of Iraq and did so because we apparently allowed them to force refugees into our sector. As I witnessed such activities, I was ethically obligated to disregard COL Huffman's

instructions, disagree with his advice, and go over his head with the violations of the Geneva Conventions I observed. I did not want to publicly disagree with my superior Judge Advocate and lay untenable facts on the table in front of a politically connected 2AD (fwd) commander (BG Blackwell) who had been carefully "spun up" to disengage from the refugee problem. I knew it was cleaner and better for the U.S. of we were not responsible for refugees in any way. I too liked the plans better than the facts. I too wanted to go home. I did not like the desert.

8. Unfortunately, all this compelling considerations did not change the facts and they did not change the law. I had raised my hand as an officer of the United States and as an Attorney. I was obligated to uphold, and in my capacity as legal advisor, counsel compliance with the law. Allied forces were not treating the refugees in a manner consistent with the Geneva Conventions. The violations were clear, on-going, unexcused by operational exigencies, and unmitigated by reasonable attempts at compliance. Investigations called for by the Geneva Conventions were being replaced with cover-ups and gag orders. Under the circumstances, I could provide no other advice. The refugees were in American occupied Iraq. They were dependent upon Allied forces for their continued existence. We knew this because they were moved from Saudi Arabia and back into occupied territory by denying them food and water. This was not lawful repatriation as required by the Geneva Convention.

9. The refugees had no other means of support; we had bombed their electrical power stations and water sources. Because of our economic boycott, strafing, Collateral damage and involvement in supporting a civil war in Iraq, the refugees were driven from their homes. Many were Shiite Moslems and Kurds who operated with American military forces. As things stood, the refugee and their family members could not (and some did not) survive.
Courses of conduct other than that which I pursued

would have been unethical, incompetent, and would have made me a co-conspirator to criminal misconduct. I knew the political and career motivated JA(s) with whom I disagreed, with their supporters and coat-tailers, we would fall in line to cover each other, and that they might kill my career. I was unaware of the possibility that the "stay 3 kilometers away from the refugee camp" rule could have originated at levels far above that of COL Huffman's. Nonetheless, lives and the rule of law were at stake and all other self-serving considerations paled in comparison. I gained admission to BG Blackwell's office, put the Geneva Convention articles in front of him and told him the continuing course of conduct Allied forces were pursuing were illegal. This put me in the untenable and unenviable position of having disregarded the "advice" (illegal command influence) of a superior Judge Advocate and of having established myself as a potential witness against my own superiors. Although not well received, my advice and suggestions regarding the processing and treatment of refugees was entirely followed. General Blackwell immediately thereafter involved MG Franks in resolving the problems. MG Franks flew in and my position was debated. (I was told that COL Huffman continued to disagree with me). Nonetheless, my advice was followed. The Saudis were induced to change their position. The refugees were allowed back to Saudi Arabia and their treatment was improved as to substantially comply with the Geneva Conventions.

10. In sum, I request the relief described in paragraph 1. My unique vantage point provided me with facts which ethically forced me to jump my technical and belated senior rating chain of command. To conform the refugee mission to the law, I was required to take extraordinary measures. I had no other choice. My position and the rules of Professional Conduct governing Judge Advocates obligated me to provide candid legal advice to the 2AD Cdr. These rules of professional conduct forbid, as a conflict of interest,

the exercise of undue influence by the legal advisor of a superior commander. COL Huffman's instructions to "leave it alone" were the exercise of illegal command influence. As an attorney, I was ethically obligated to uphold the law and take the steps I took in counseling compliance with the law. My actions were appropriate, honest, and conscientious, nothing more and nothing less. COL Huffman's deafeningly loud and faint praise and between the lines writing style was, and is, deliberately calculated to terminate my career. It is carefully contrived, concealed with qualification, and camouflaged with seeds of truth. However, it is described; it amounts to the same thing: reprisal. COL Huffman did not consider my opinion professional disagreement. He made this clear by giving me the first blow below center of mass OER. and the first negative OER comments of my entire 8 years as a Judge Advocate. Because I was sent to school after Desert Storm and could not favorable OER prior to my second Major promotion board, the OER assured a second Passover and my automatic involuntary separation. Thus, I was constructively discharged by the negative OER given me by COL Huffman.

Respectfully,
/Signed/
Paul D. Kerian

Encls
A) OER
B) Statement of Rater
C) Award & Recommendations

APPENDIX H

23 AUG 1994
KERIAN, PAUL P., CPT. 475-70-7412, JA

DCSPER OFFICER SPECIAL REVIEW BOARD
CASE SUMMARY

OER APPEAL

Appeal Received by OSRB; 28 Jul 94

Promotion/retention status: 2XNS, MAJ
Released from AD: 25 Fob 93.

EVIDENCE/DOCUMENTS RENEWED:
1. Contested OER, 901206-910512, (End 1)
2. Appellant's OMPF
3. Appellant's Memorandum, OER Appeal/Self-authored Statement, 30 Nov 93
4. Memo, LTC Warren (Appellant's Rater), 27 Sep 93
5. Award Recommendation, MAJ Gibbs (EPW Cell OIC), 25 May 91

AR REFERENCES: AR 623-105 (OER System) unless otherwise stated.

DISCUSSION:

1. This is the first appeal of a 5-month (Change of Rater) OER for the above period while Appellant was the Brigade Staff Judge Advocate, for the 14th MP BDE, USAREUR, serving during Desert Storm in Saudi Arabia and Iraq. It was not referred.

2. Appellant contends the OER is unjust. He states that COL Huffman, the Senior Rater for the OER in

question, should not have been his Senior Rater. Instead, he contends, the senior rating should have been made by COL Pomager, the then Commander of the 14th MP BDE. The Appellant indicates that COL Pomager refused to senior rate him and "by default" COL Huffman became the Senior Rater. Further, he states that COL Huffman "was never" in his rating chain and that the Appellant was not aware of "the possibility" of COL Huffman becoming his Senior Rater until April 1991. Lastly, the Appellant states that this is the "first below center of mass OER, and the first negative OER comments" that he received. Appellant requests the OER be amended by changing Part VII b. to conform to the language of the Rater's evaluation, that Part VII a. be changed to a "1" Block, and that he be reconsidered for promotion to Major.

3. As evidence Appellant provided documents listed above.
a. The following documents were not pertinent to the period of the appealed report and the issues raised, or otherwise not considered to be useable evidence:

(1) DA FORM 638-1, dtd 25 May 91, Recommendation for Award of an ARCOM, signed by MAJ Gibbs, OIC EPW/Customs Cell, provides no evidentiary information pertinent to the circumstances of the Appellant's senior rating.

b. The following documents were considered to be pertinent evidence.

(1) Appellant's Memo.

(2) The written statement from LTC Warren, Appellant's Rater of the contested OER, asserts that the published rating chain named COL Pomager, the Brigade Commander, as the Appellant's Senior Rater; but, at the end of the rating period COL Pomager relinquished his Senior Rater position. Additionally, the statement indicates that it was possible that COL Huffman, Senior Rater

of the contested OER, "may have lacked certain insight into the performance" of the Appellant.

4. The OSRB contacted the rating officials on the dates indicated below. Each was informed of the Appellant's contentions and a need for further information, and they agreed to release of a paraphrased summary of their comments understanding that it could be released to the Appellant under the Freedom of Information Act/Privacy Act, FOIA/PA.

a. On 10 Aug 94, LTC Warren (the Rater) was initially contacted. She stated that she joined the 14th MP BDE in Saudi Arabia in Jan 1991. That within 90 days of arrival, she spoke with COL Pomager, the BDE CDR, and they agreed to change the Appellant's rating scheme to designate COL Huffman, the VII Corps SJA, as the Senior Rater. This would enable a "JAG officer" to be in the Appellant's rating scheme. LTC Warren further stated that she spoke to the Appellant about the change of Senior Rater and he agreed to the change. On 18 Aug 94, the Rater was again contacted to ascertain exactly when COL Huffman became the Appellant's SR. In a sworn statement the Rater made on 27 Sep 93, she stated that; "At the end of the rating period, COL Pomager relinquished his Senior Rater position on CPT Kerian to COL Huffman who then acted as CPT Kerian's Senior Rater." [OSRB Note: This would indicate that the timing of the actual change in Senior Raters is such that the new SR did not have sufficient time to perform as the Appellant's SR.] LTC Warren stated that she was not exactly sure when the decision was made to change Senior Raters. She believed that the official rating scheme was changed, but could not say when. She believed that the circumstances where close to the new SR having been such for "60 days", but wasn't sure.

b. On 11 Aug 94, COL Pomager was initially contacted and provided the following

information. He felt that because of the nature of the work that he would face as the Corps Provost Marshall in a combat Theatre, he (law officer) and the Appellant (legal advisor) could find themselves at odds and or in disagreement on issues. Therefore, he intentionally took himself out of the rating chain for the Appellant to ensure fairness to the rated officer. He went on to say that he felt that the Corps SJA, the Corps senior legal officer, would be better as the Senior Rater. **[OSRB Note: The Appellant in fact performed in the capacity of legal advisor for the Corps' refugee security mission.]** Lastly, COL Pomager stated that he believed that COL Huffman had an opportunity at least twice a week to be aware of the Appellant's performance. On 19 Aug 94 COL Pomager was again contacted because of the significance of the timing of the change of Appellant's SR. COL Pomager stated that he could not remember if or when an official rating scheme change for the Appellant was made and could not remember exactly when the official change in Senior Raters occurred. He further stated that there were numerous shifts in personnel occurring at the same time missions changes were occurring.

c. The Senior Rater was contacted on 17 Aug 94.

(1) As the Corps SJA, the Senior Rater had become the Appellant's SR primarily because of a change in the legal jurisdiction of Corps units. The legal/command relationships had changed after they deployed into Saudi Arabia. In USAREUR, legal jurisdiction was established on an area basis. Upon arrival into the Theatre, the legal jurisdiction shifted to a command relationship. As such, COL Huffman converted the majority of the Corps' Separate BDE's and other 06 CMD's rating schemes so that the Corps SJA was the SR of their SJA's. Accordingly, the Appellant's rating chain was effected by this change of relationship. COL Huffman and COL Pomager discussed the above and agreed that COL Huffman would be the Appellant's SR for the above reason, as well as for

the concern raised by COL Pomager —— the possible conflict between the Corps Provost Marshall and his BDE SJA.

(2) The Senior Rater stated that he had numerous opportunities to observe and/or be apprised of the Appellant's performance. Over some periods, the Senior Rater personally saw the Appellant weekly. On at least three occasions over the rating period in question, the Senior Rater specifically spoke with the Appellant on "how he was doing". Overall, the Senior Rater felt that he had sufficient exposure to the Appellant to properly evaluate him.

5. Para 9-7a places the burden of proof on the Appellant to provide clear and convincing evidence to justify deletion or amendment of an OER. Such evidence was found in this case.

a. The Appellant states in his memo that COL Huffman, the VII Corps SJA at the time, was not his Senior Rater. In fact, as clarified by his Rater, his BDE CDR, and the Corps SJA, COL Huffman became the Appellant's Senior Rater and the Appellant was aware of it **[Paragraph 3-11.a.(2) states that normally, the Senior Rater must be a supervisor above the Rater in the rated officer's chain of command or supervisory chain.]** In this specific case, COL Huffman was designated as the Appellant's Senior Rater. COL Pomager believed that this was the best way to ensure fairness to the rated officer. COL Huffman had taken action to have the majority of the Corps SJAs who were assigned to separate BDEs and other 06 CMDs be senior rated by the Corps SJA. Because of COL Pomaqer's role as both BDE CDR and CORPS Provost Marshall there was the possibility that the Appellant (who was the BDE's and in some cases the VII Corps' legal staff representative) and COL Pomager (as Provost Marshall) could have opposing legal positions. To ensure that such a

situation did not cause a rating conflict and because of the changed legal jurisdictional relationships, the CORPS SJA was determined to be in a position to best senior rate the Appellant. He became the SR. **[It is not uncommon to have the senior Rater be an officer senior to the rated officer's Rater, who is best qualified to provide the senior rating because he or she is by Branch qualification and duty assignment in the best position to evaluate the ability and potential of a rated officer.]**

b However, given the fact COL Huffman was the Appellant's SR, the question of sufficient time as the SR must be addressed. [Paragraph 3-10.b.(1) states that to evaluate the rated officer, the Senior Rater must normally serve in that capacity for a minimum of 60 calendar days.] As best can be discerned from the information provided by the Appellant and the statements of the Rater, Senior Rater, and BDE CDR —— COL Huffman was not the Appellant's SR for a period of 60 calendar days prior to the ending date of the period covered for the contested OER. Therefore, COL Huffman did not have the required number of days as the SR to effect his rating.

In sum, the appellant did provide and the OSRB did find the necessary evidence to amend Part VII of the OER; therefore, the presumption of regularity referred to in paragraph 5-32a is not applicable to that Part. CONCLUSIONS: There is sufficiently convincing evidence that Part VII of the contested OER is not IAW paragraphs 3-10.b.(1) and 4-16.d.(3). Therefore, the report should be amended.

KERIAN, PAUL P., CPT, 475-70-7412^ JA

RECOMMENDATIONS:

1. Partially approve the appeal.

2. The following amendments should be made to the contested OER:

a. Part VII a. - delete the block mark and remove the SR profile from the OER.

b. Part VII b. - delete in its entirety; and replace with the statement: **"I am unable to evaluate the rated officer because I have not been his senior rater for the required number of days."**

3. File appeal correspondence on the R-fiche.

4. Promotion reconsideration is not warranted because of this change to the Appellant's file. The ORSB is not convinced that there would have been a reasonable chance for selection had the change been made before the Appellant was considered.

DEPARTMENT OF THE ARMY
U.S. TOTAL ARMY PERSONNEL COMMAND
ALEXANDRIA, VA
22332-0442

REPLY TO
ATTENTION OF

29 AUG 1994

TAPC-MSE-A (623-105)

MEMORANDUM FOR RECORD

SUBJECT: Officer Evaluation Report/Academic Evaluation Report (OER/AER)

NAME: Kerian, Paul D. SSN: 475-70-7412 RANK: CPT BR: JA

PERIODS: 901206 - 910512 P Frames thru)

1. ACTION:
( ) The OER/AER is hereby ALTERED as follows:

(x) The OER/AER has been ALTERED.
( ) The OER/AER is DELETED and the same period is DECLARED NONRATED.
( ) An OER/AER has not been received. The period has been DECLARED NONRATED.
( ) OTHER:

2. AUTHORITY FOR ACTION:
(x) DCSPER Officer Special Review Board dated **23 August 1994.**
( ) PERSCOM administrative correction
( ) OTHER:

ERIC E. LARSEN
Chief, Appeals and
Corrections Branch

Original To: TAPC-MSR
Copy Furnished:

TAPC-MS FL 14
12 May 1986

APPENDIX I

DEPARTMENT OF THE ARMY
U.S. ARMY TEST AND EVALUATION COMMAND
ABERDEEN PROVING GROUND, MD 21005

AMSTE-JA

16 Dec 92

MEMORANDUM FOR Army Board For The Correction Of Military Records

SUBJECT: Appeal from Denial of Whistle Blower Protection and Application for the Correction of Military Records

1. On 20 November 1991, I CPT Paul D. Kerian filed a petition with the Department of Defense, Office of the Inspector General (IG) invoking the Military Whistle Blower Protection Act, 10 USC 1034, DOD Directive 7050.6 (TAB A). An IG investigation was conducted and I was denied whistle blower protection on 20 June 1992 (TAB B). I appeal and request a personal hearing before the Army Board for the Correction of Military Records (ABCMR). I also request access to the IG Investigating Officer's complete report, to include excised portions of exhibits 2, 3, 4, 6, and 8, as well as the appointed counsel which I was denied by the IG's denial of whistle blower protection. Lastly, in the interest of full and fair consideration of this matter, I request that the ABCMR direct full disclosure to me of the contents of any collateral or ethical investigation(s) into the facts and circumstances addressed in my petition for whistle blower protection.

2. This petition for relief is advanced on two distinct basis, both of which relate to the circumstances surrounding American involvement in the Persian Gulf Conflict. This appeal is both: 1) An appeal of the IG's denial of protection under the whistle blower Protection Act; and 2) an independent request that the ABCMR utilize its

broad remedial powers to correct the Persian Gulf related personal actions which have resulted in my non-selection to the grade of Major in the active component of the U.S. Army and my release from active duty. The reprisal I suffer includes actions not correctable through the OER appeal process. Therefore, exhaustion of the OER appeal process, as an administrative remedy, is neither practical nor appropriately available.

3. I request to ABCMR recommend the following: That I be awarded an end-of-tour MSM for my overseas tour ending July 1991; that the derogatory comment accusing me of "overzealousness" be removed from the senior rater portion of my post Desert Storm OER; and, that the 2nd block senior rating for my post Desert Storm OER, be elevated to the top block position. Whether or not I am afforded whistle blower protection, these career recrimination for my ethically mandated Desert Shield / Desert Storm (whistle blowing) efforts to encourage compliance with the Geneva/Hague Conventions (GC).

4. The Inspector General investigation from which I appeal was slow, superficial, and inaccurate. The delay in initiating, and excessive time used in conducting the investigation contributed substantially to the erroneous findings. Because of the delays involved, the investigating officer lacked the time he needed to properly assess the facts under investigation. T he investigator also lacked the time he needed to understand the law.

a). The legal and factual deficiencies in the investigation are illustrated by the numerous errors in the evidence used by the IG investigating officer to justify his conclusions. These issues of mixed fact and law are addressed starting at Para. 20 below.

b). Most recently, on 11 December 1992, I received a response to my original whistle blower

protection from COL Alan Paczkowski. Colonel Paczkowski inaccurately stylizes my compiaint as being against the 14th MP Bde. My complaint had nothing to do with the 14th MP Bde; the breeches of law I complained of were top driven, from the Corps and Division level or higher. The 14th MP Bde was impeded by the illegalities I encountered and its membership worked with me to compensate for the illegalities for which I complained. What is important about this correspondence however was its enclosure. Enclosed in Colonel Paczkowski 11 Dec letter is a 3 page writing entitled: Answers to questions regarding the rules for the care and handling of refugees in Southern Iraq during operation Desert Storm. This DA position paper is substantially incorrect; both factually and legally. I request the opportunity to also explain the DA/DOD level errors within this writing as I appear before the ABCMR. I enclose this writing (Encl. A-A).

5. Had I been personally interviewed by the IG investigator, as I understood was to occur, the above mentioned error (investigating the wrong organization) might have been avoided. I expected to be interviewed. In fact, due to the IG investigating officer's admitted investigative bias and predisposition, I planned on challenging the investigating officer's neutrality and objecting, on the record, to his continuing as the investigator. I would have challenged him for cause, so to speak, based upon statements indicating his predisposition, which he made to me during a phone conversation in February 1992. During this short "preliminary" phone conversation, our only "interview", he told me that if the decision to not "occupy" Iraq at diplomatic levels, there was nothing that he, or any investigator, could do to help me. (Comparing the official position on occupation at Encl A-A to the transcripted testimony of LTC Chapman, SJA 2Ad, at Encl B shows that the current DOD/DA official version of the is newly arrived on the scene and had nothing to do with the events of Desert Storm). I honestly believed the investigating officer

was going to interview me in person to obtain my witness list, naming the witnesses to the facts and circumstances I discussed in my submission (as I indicated in paragraph 32 of my initial 20 Nov 91 petition for whistle blower protection), I was never interviewed. The investigating officer therefore not only failed to investigate and learn the facts, but he and/or his legal advisors, who he described as Judge Advocate(s) from the USAREAUR JA office, failed to understand the law or even what to investigate.

6. American forces in Iraq had a legal obligation to afford the protections of the GC to Shiite Moslems and other refugees in Iraq. There was a population indigenous to that area and many others were forced to move from their homes by the fighting, destroyed infrastructure and air war destruction of their power plants which deprived the opportunity to pump water. Both houses of Congress passed or adopted the GC. The GC was and is binding fundamental law. Diplomatic and command influence could neither lawfully dispense with the fundamental legal imperatives of the Geneva Conventions, nor the incorporated "humanitarian" obligations described by international law. Similarly, passing or palming GC obligations off to our allies, when we knew they were not complying, did not wash our hands of our obligations. The investigating officer's "transcript" of our conversation fails to include his expressed biased predisposition as they related to the dispositive nature of what he characterized as diplomatic decisions.

7. Based upon the Investigating officer's inaccurate and selective marshalling of facts and law to justify his conclusions, I can only conclude that his investigative neutrality was subverted by incorrect legal advice. Time and cooler heads now show that my advice was accurate and proper. I include a cross section of newspaper articles and a scholarly legal writing which evidence the propriety of my legal advice and the facts upon which the advice was premised (Encl C). I have witnessed with personal

knowledge that COL Rupert, the CENCOM SJA, declared that Iraq was occupied territory and that COL Bozeman, the 18th Airborne Corps SJA, and COL Huffman, the VII Corps SJA, took the opposite position.

8. From the onset I felt compromised by the IG investigative process. The first person to contact me after I submitted my whistle blower protection petition was COL LaGrua, a senior Judge Advocate! He exacted my acquiescence to the release of my IG complaint to the Judge Advocate General. The judge advocate officer told me that release to the Judge Advocate General was necessary to initiate an ethics investigation into the "substantial ethical violations and improprieties presented by my complaint." To my knowledge, no ethics investigation was ever conducted. Without the unnamed witnesses I proffered in my original petition or any interview of myself, how could there have been any ethics investigation? It appears "investigators" wanted just enough information to orchestrate an attack upon my character.

9. If what I have been told by my peers is true, my whistle blower protection petition was circulated behind the scenes, resulting in a compromised investigation and orchestrated results. Several of my peers have related to me that hey had heard that I initiated IG investigation because I was sour grapes about not receiving a Bronze Star. By characterizing my complaint as one against the 14th MP Bde I can certainly see where members of that organization are more than a little upset with me! These tactics are cruel, unfair and untrue. Had I known my complaint was to unfairly and inaccurately disclosed and rumored behind my back through the JA Corps or wherever it could be used to turn potential witnesses against me, I might have thought more seriously about going directly to Congress or the press. It is difficult for me to ignore the possibility that these rumors and prejudicial disclosures may have contributed to my non-selection to the grade of Major. Perhaps COL

Huffman, the advising JA from USAREUR, or any of the others with access or input into the investigation, sat on the promotion board which non-selected me for promotion to Major! I expressed my concern about the leak of the fact that I had filed a petition for whistle blower protection to the IG investigating officer. The IG investigating officer promised me that he would investigate the legitimacy of this leak and the authenticity of the ethics investigation. The investigating officer's "transcript" of our conversation also fails to mention this portion of our discussion.

10. My 20 November 1991 whistle blower protection petition accurately recounted the Persian Gulf related irrational decisions and "illegal" advice which I observed, reported and attempted to address. These decisions resulted in the needless death of American soldiers/souvenir hunters searching for "war trophies" as allowed by GO #1, in contravention of UCMJ Art. 103 It also detailed my efforts to redress legal problems leading to unnecessary death, suffering and the deprivation of dignity, humanity and property of innocent prisoners and refugees. None of these allegations were, to my knowledge, investigated. Yet the investigation concerns itself, and indeed turns upon subjective, undocumented, after the fact innuendo which is used to label me a management problem with a history of personality conflicts. An accurate investigation would substantiate the problems I attempted to resolve. In seeking resolutions to these problems, I incurred the wrath of my superiors who allowed the wrongs and illegalities to exist; the same wrongs about which I "blew the whistle". The alternative was the continued unnecessary suffering and loss of human life. I had no choice.

11. The wrongs were obvious, clear and easily remedied. I helped resolved many myself. Unfortunately, military officers are occasionally so obsessed with their careers that they will allow wrongs to go unresolved (unrecognized if possible) so they can be team

players and go with the flow rather than confront difficult intractable problems and thereby become part of the problems (creation). Because I was personally confronted with unnecessary death, suffering and violations of law, I was obligated to take a strong position, and, where in my power, to remedy breeches of the GC. The serious breeches of law I confronted included: improperly circumscribed evacuation of EPW from the battle zone; no reasonable arrangements for the burial of enemy dead; policies against bottled water or helicopter medical evacuation for wounded prisoners of war; and no bottled water, medical care, sanitary conditions, repatriation or accountability for refugees. Although the Corps Order correctly addressed many of the problems I confronted, COSCOM policies communicated in the field were far different. Predictably, such policies and/or omissions caused unnecessary death and suffering. I, to the embarrassment of my superiors, did what I could to prevent unnecessarily, eminent, foreseeable and obvious death and suffering. I recount these incidents not to complain but to help explain the situation I found myself in as I was handed responsibility for the refugee mission. The wartime problems I address above I resolved to the best of my ability, without complaint. I have witnesses for these fact.

12. Few, if any, of the egregious facts presented in my complaint were investigated. To my knowledge, no one has spoken to witnesses who could help establish the matters I present. No one has even asked me who these witnesses are. No one has spoken meaningfully with me regarding the facts or the evidence marshaled against me. I cannot stop those intimidated by my whistle blowing from slandering me behind my back, but the facts remain; until I arrived at Rahfa and began to take issue with the improprieties, the obvious plan was to move the refugees from Saudi Arabia into U.S. occupied territory and abandon them there without effort to account or repatriate. Put another way, the plan was to take defenseless, hungry, thirsty refugees and

Shiite allies who had risen up against Sadam, remove them from the protection afforded by the Saudis in Saudi Arabia, shelter them in our little occupied territory dirt perimeters, wash our hands, pull out, and leave them there. The plan included a lengthy introductory neglect period where decreasing food and water and increasing unsanitary conditions were used to induce the refugees to leave "voluntarily". There was no effort to comply with the GC requirements concerning accountability or repatriation because the refugees' existence was never acknowledged. The press and international relief agencies were kept from the area or given inaccurate little dog and pony side shows. A lawful solution to the situation required someone with insight into the facts and public international law to advance the rule of law, over diplomatic expediency. I was apparently the only one available with the training, insight or experience to accomplish that mission. I did my job.

13. There is more at issue here than my career. This appeal addressed the institutionalization of misconduct which killed American soldiers and their humanity; their right and obligation to obey fundamental humanitarian law. I understand the military requires a singleness of purpose and conformance to orders, I did that. I was aware of the limited assets at our disposal and the practical, strategic and diplomatic reasons for avoiding entanglements; that U.S. forces were leaving the area. My advice and actions were at all times in consonance with these considerations. Consider the fact that if it were not for me making much of the inhuman treatment, demanding investigations into the massacre and raising the specter of accountability, the Saudis would never have agreed to accept the refugees into their country. If everyone has accepted the inhuman treatment of refugees, as everyone seemed to want, as the standard in that part of the world, at that time, the Saudis would have felt no guilt or responsibility for their unacceptable treatment of the refugees. It is easy to say it was not a problem now. But it was not so easy if you were there with your

eyes open. I briefed COL Huffman and BG Blackwell early on. It was my input which helped exact the accountability which induced the Saudis to accept the refugees from occupied territory.

14. I now understand why so many American soldiers were traumatized for life by the Vietnam Conflict. They were denied the opportunity to conform their behavior to the rule of law and the norms of civilized nations by unlawful orders and illegal command influence. My experience had a relatively happy ending. The refugees were taken care of, somewhat. Each American soldier has the right to comply with the GC. Truth and reality, not the personal agendas of officers and political appointees (who neither sully their hands nor afterwards live with the suffering that is war), are what soldiers live and die with. An order to stay three kilometers from the refugees being neglected by our "allies" can not and should not insulate us from responsibility for the unnecessary suffering we deliberately accommodate. Whistle blowing, a little sunshine and attention on the charade, was the best cure.

15. My desire for justice has not taken out outside my agency for public support. I have not resorted to the press or "political" means of support. All I ask of my agency is that I not be punished for providing correct legal advice and performing my duties. I am able to detail incredibly disturbing perceptions and observations; for the most part I have not. I could sling mud, as the IG report does against me, which could objectively call into the question the professionalism, idealism and heroism of those who slander me, I choose not to. I could make very personal attacks on the integrity and motivations of superior officers. I do not. I feel an obligation to my country and the names and memories of those who served honorably in the Gulf. All I want is an accurate investigation, an appropriate professional response, and relief from the reprisal I have suffered. The Whistle Blower Protection Act under which I

petition for relief is remedial in nature, as such, it should be broadly construed to vindicate its intended purpose and afford me relief. The mandate given the ABCMR affords an independent avenue for equitable relief.

16. The investigating officer added quotation marks to his "transcript" of our conversation or cut and pasted together an inaccurate and highly prejudicial painting of our conversation. If his other interviews are as unfair and inaccurate as his record of "our" conversation, the "investigation" is without value. I am confident that with a personal hearing before the ABCMR, the factual inaccuracies within the IG investigator's "transcripts" and conclusions will be readily apparent. AS a preliminary step towards resolving this issue, I request that the ABCMR direct disclosure to me of any and all tape recordings of the IG investigating officer's interviews.

17. My detractors paint a picture of me as unreasonable. I was never even a little professional. Contrary to the hateful picture painted of me by the investigation, I was always ready to listen and be reasonable. I submit a copy of a recently obtained award recommendation. I first became aware of the existence of this document when I received it 20 Oct 92. This recommendation was based upon my duty performance observed by a MAJ Gibbs, a fellow S-3 action officer, who arrived to Saudi Arabia about 20 February 1991. I have neither seen nor heard from MAJ Gibbs after I departed for Rahfa in March 1991. This document was sent to me from Germany (Encl D).

18. The reprisals I suffer result from my provision of legal advice based upon life and death realities and incontrovertible, fundamental law. I refused to render specific legal advice based upon command directed or diplomatic characterizations unrelated to reality. In return for the extra work and slight embarrassment resulting from my legal counsel, who was at odds

with that of my technical chain, I have suffered great humiliation. COL Huffman is the former chief of Judge Advocate Plans Personnel and Training. Of course, he knows how to destroy a career without making it obvious or a referred report. He was aware of earlier favorable endorsements he had given me and carefully cloaked the destruction of my career in faint praise and perfunctory references to endorsement and promotion. But even his obligatory (for his own credibility) reference to multiple episodes of overzealousness and a bottom-of-the-rating-scheme senior rating. Ratings inflate drastically at board time. Below center of mass for a Captain, who, after 6 relentless years of practice, approached the Major promotion board, with an all-important wartime OER, is a killer. A pre-promotion board dive like mine guaranteed my non-selection to major.

19. Because of the pressures, lack of whistle blower protection, and the threat of involuntary separation (with its attendant stigma and financial loss) I have no meaningful choice but to leave the Army. I am now doing so. I will be released from active duty shortly. I leave "voluntarily" but I am being driven from active duty. I am afraid to say more about the reprisal I continue to suffer. I fear I will be denied relief and further disclosure would kill my ability, in the future, to obtain a reserve retirement, or continue my affiliation with DOD, in any respect.

20. I now address some of the factual errors in the evidence "transcripts" and findings of the IG investigating officer. This evidence and the findings stemming from them were used to deny me whistle blower protection. The IG investigation contains findings and recommendations with respect to 4 issues. I summarize and respond to the investigator's findings blow.

21. The investigator concluded that I made no protected disclosures. The facts presented by the

investigating officer paint a picture of me complaining to a MAJ Talbot in the company of a CPT Lederer, JA, and a LTC Chapman, SJA, 2d AD, on only one occasion.

a. The transcripted "testimony" and the finding are inaccurate. The testimony is so inaccurate that it is truly frightening, for I cannot believe all of these people could have accidentally orchestrated such inaccuracy. Contrary to the evidence presented and relied upon by the JG, I spoke to MAJ Talbot many times (at least four times). On more than one occasion I complained about violations of the Geneva Conventions. I also afforded MAJ Talbot legal advice, and, on another occasion, had lunch with him at the 2d AD (fwd) mobile mess hall, on the airfield at Rahfa. CPT Lederer was present for probably two or three of my conversations with MAJ Talbot. I spoke with CPT Lederer additional times and afforded him legal advice on criminal matters, property accountability and standards of conduct. The SJA, LTC who I spoke with on only one occasion, was not present for any of these conversations. With a little prodding from myself or my attorney, under oath, before the ABCMR, I am sure these people will recall these conversations.

b. The JG investigation leaves one with the impression that I arrived after CPT Lederer and MAJ Talbot. CPT Lederer arrived to replace me as acting SJA forward for the 2d AD (fwd). I was replaced for clearly and objectively making the requirements of the Geneva Convention known to the IG and BG Blackwell. MAJ Talbot acknowledges this, albeit inaccurately and prejudicially, in his "interview." CPT Lederer acknowledged this to me himself. CPT Lederer specifically told me that he was surprised: "I was sent here." He was, he related, to me, working other issues and was earlier told he wouldn't be coming to Rahfa. Unexpectedly, and abruptly, he was sent to Rahfa. He also told me that he was given the distinct impression that I had done something wrong and he was sent out to Rahfa to

resolve the problems, after the Saudis agreed to accept the refugees, after the planning, execution of the transfer, construction of the temporary refugee camps in Saudi Arabia and after the movement of refugees to Saudi Arabia was well under way.

22. The Investigator concludes that despite my disclosures to BG Blackwell and MAJ Talbot, no unfavorable actions were threatened or taken against me.

a. After "almost relieved" (I would love to explain this), the next apparent basis for being denied a whistle blower protection is, apparently, my three-year-old personality conflicts? Of course, I held more than one job in my 6 years in Germany. I was told many times that homesteading is the kiss of death! My wife was a Fulbright Scholar studying in Stuttgart and later sang for the Stuttgart Opera, I did not want to move too far. But I was willing to make no cost moves to better accomplish the mission, avoid homesteading and acquire a broad base of legal experience while working in Stuttgart/Heilbronn area. Only after I blew the whistle is my career progression negatively construed as attributable to my personality conflicts? COL Huffman(apparently) said I had to be moved twice because of personality conflicts. I do not remember when exactly COL Huffman arrived in Germany, but I believe I was in Heilbronn, Germany for the entire time COL Huffman was SJA for VII Corps.

b. I am a professional, competent attorney who has distaste for incompetence and careerism, especially when it exists at the cost of human life. I addressed entire military communities with my preventive law programs. I created dialog between German and American social workers and German and American judges and attorneys and institutionalized these efficiencies for attorneys to follow. Entire schools would turn out for my say no to drugs presentation. I did much to address the problems of

neglected children and the pain of single parent children overseas military communities. I also gave of my time to work for retirees. I enclose copies of additional OERs and letters of support from the time period during which I was supposedly being moved around because of personality conflicts (Encl E). If my old senior rater LTC Frothingham does not feel my work was exceptional, why did he repeatedly express this opinion in my OERs? While in Saudi Arabia my rater from Germany told me LTC Frothingham was going to get me an MSM for my end of tour award when I left Germany. I have difficulty believing that he minimized my contributions despite his loyalty to COL Huffman. But if COL Huffman is on the croy fast tract to the next TJAG slot why fall on the sword for CPT Kerian?

c. I grow weary of stagnation and inefficiency and try to proactively remedy problems. I enclose copies of other suggestions I have processed through Army channels in attempts not to blow whistles, but to work in the system to better accomplish the mission. As you can see by my lengthy submission, I have long been uncomfortable with inefficiency at taxpayer expense and the needless suffering of defenseless children (Encl F). I am a team player and even then I could not go along with an illegal course of conduct. I work within the system to help induce appropriate change. I cannot abandon my efforts to improve the community in which I live so that I might work full time keeping a far distant senior rater apprised of every good thing I ever do and thus improve my chances of promotion with eye wash. It is perhaps my failure to ascribe to this unworthy military social norm which makes the military investigators and others willing to slander me. At some point a person just has to do what is right and not worry about taking credit or the closed system consequences. I believe my rater saw this in my work and recommended me for an MSN.

d. Even if COL Huffman was present at the time I was transferred to Heilbronn (that is the

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only one move) it should be noted that the move was at my request because I wanted it, not because I had to be. I have a memo from my senior rater indicating that I was being moved at my request. My senior rater commented on my willingness to move to accomplish the mission in my OER and held the move out as one which would be of benefit to the mission. I am a friendly, easy to work with, loyal employee. I grow impatient with incompetence and unethical careerism, but I do not allow personality conflicts and politics interfere with mission accomplishment.

e. COL Huffman and the IG investigating officer attribute his poor rating and downgrading of my end of tour award to my past "personality conflicts". Yet my OERs consistently mention my strong integrity, idealism and dedication, they speak for themselves. JA's in non-leadership positions at VII Corps who were far junior to me, in less responsible positions than those I held, were given MSMs upon departing VII Corps. I can provide names if this is deemed relevant. At the JA advance course (TGAGSA graduate course #40) I was one of about 10% of my peers who did not wear an MSM. An extremely high percentage of those non-selected for Major were without an MSM. Prior to the war, COL Huffman gave me a strong letter of support for VOLUNTARY INDEFINITE STATUS and THE GRADUATE COURSE (Encl G). There is nothing in my past but the war and the professional disagreements it induced, which explain COL Huffman's orchestration of the demise of my career.

23. Contrary to the conclusions of the investigating officer, and despite the innuendo addressed above, I suffered reprisal as a result of protected "overzealous" disclosures.

a. My evaluation was substantially below center of mass despite the fact that I performed all the normal Judge Advocate wartime duties and successfully handled the prisoner of war, customs and refugee missions

for the Corps and in some respects, for the Theater. In Germany my work was outstanding. Ask the people who supervised my work and recommended me for an MSM. My MSM was reduced by COL Huffman. But more than merely downgrading the award, he employed heavy back door pressure to discourage even the submission of an award recommendation by my supervisors on my behalf. Further, I was displaced as the acting JSA of 2d AD (fwd) and replaced by CPT Lederer. And this because I was correct! My OER (with the exception of COL Huffman's devastating comment and 2 block) was drafted by a person who actually saw my work. I personally created the training aids, GC disciplinary process and procedures included as appendices to my original 20 Nov 1991 request for whistle blower protection. The MPs I trained and the Corps soldiers who used my training aids did a wonderful job with the EPW mission. Please look at some of my Desert Storm legal work, it was extremely successful at accomplishing the mission because it anticipated problems and resolved them early on. I suspect my "overzealous" complaints about Saudi GC compliance, which were passed up and over to Saudi channels, were instrumental in inducing Saudis to accept the refugees into Saudi Arabia. Most others felt that "war is hell", "we're not here on a welfare mission". "Oh, well". "things are just handled a little differently in this part of the world" was explanation or excuse enough and nothing further could be done to uphold the law (from the bus to Abelene).

b. COL Huffman didn't know he was going to senior rate me until the end of the rating period in the Gulf! Nor did I. In fact, COL Pomager decided that he would not be my senior rater only a couple of days before I left for Rahfa. My published rating chain listed COL Pomager as my senior rater. As I explained in my original petition, I believe COL Pomager made his decision not to senior rate me because he knew I had received and acted upon conflicting instructions from COL Huffman and he knew my advice and actions were correct, legally

and morally. After I was made the task force SJA in Rahfa with 2AD (fwd), the same thing again happened to me: COL Huffman went behind my back and gave legal advice based upon legal fiction, doctrinal wishful thinking and mission statements unrelated to reality, leaving me on-site legal advisor, unsupported, as I attempted to deal with harsh facts.

c. At the conclusion of hostilities, as I worked the refugee mission, just as I was earlier the lawyer responsible to ensure EPWs were processed and handled in accordance with the law. COL Huffman unethically and incorrectly attempted to influence my professional independence and discretion. It now seems obvious that both COL Huffman and COL Pomager had been influenced to buy into an illegal, or shall we say ill-advised plan or course of conduct, as it pertained to EPWs and gathering souvenirs. With to the mess in Rahfa, perhaps they just inherited it from COL Pozeman. The plan, with the deficiencies I recounted in my 20 Nov 91 petition, involved ignorance of obvious and foreseeable, no expectable unnecessary human suffering. My objections to the Saudi mishandling of refugees was not :overzealous" they were echoed by others. As mentioned in my initial petition, when I was communicating my complaints through technical channels, I was assured that letters were written by General Officers and communicated to Saudi Generals. Within weeks of the time COL Huffman told me about these letters (to stop me from elevating my complaints to even higher levels) the refugees were massacred and the Saudis decided to accept the refugees. The obvious mission, at that juncture (especially for lawyers and commanders) was to protect the refugees, and this, as a result of my whistle blowing, was achieved.

d. This pattern repeated itself. For example, the EPW mission was neglected. I and other S3 action officers obtained transport to evacuate prisoners, obtained bottled water, a forklift to move food and water. After the EPW mission was safely concluded those who

resented my issue identification and input were pleased with the results. It was no longer such a problem. In fact, I was picked to be the on-sight legal advisor who would address the next troubling issue: the refugee problem. If I was such a problem, why was I given this difficult Corp or theater wide mission? I believe it is because they recognized the fact that I can be counted on to do what is right. When people are dying or suffering needlessly I had proven that I would do the right thing, even where it meant I had to honestly, respectfully, and professionally place my career on the line by publicly dissenting outside technical channels. This is why there is the need for a Military Whistle Blower Protection Act. At the time I did not know the Act pertained to soldiers. I obviously knew about the IG. The situations I encountered, which the ABCMR now confronts, are exactly the scenario Congress wishes to address with the Act.

e. During the ground war/EPW phase I sought to redress the transport, water and burial issues. When they continued to plan on not complying with the law, I tried to resign, as required by Rule 1.13, Rules of Professional Responsibility, DA PAM 27-26. Perhaps because he knew I had a point, or perhaps because he felt he needed me, I was not allowed to do so. This is evidenced in my OER. COL Huffman had to admit my contributions were "immense". Yet the investigating officer wants to point out I was "almost relieved" and that I was "having problems" as he attempted to justify the reprisal I suffer. There were problems, but they were not mine. I merely honestly sought to resolve them.

f. The investigator recounts inflammatorily generalities about me "almost causing international incidents". I thought the investigation was supposed to be at my behest into past arbitrary and capricious abuses of discretion visited upon me for attempting to encourage conformance to the rule of law. Instead he investigates

innuendo, gathers slanderous comments and documents the unhelpful rumors a whistleblower protection petition creates.

g. COL Pomager's "interview" actually or fairly yielded the fact that I almost caused an international incident. How did I almost cause an international incident? After receiving the 11 Dec 92 letter from COL Paczkowski (Encl A-A) I understand why COL Pomager believes I cause problems. He was obviously led to believe my report of misconduct blamed him and his command for all the problems. Assuming that he has not been turned against me with behind the scenes inaccurate dissemination of my whistle blower protection petition, and assuming he actually said I almost caused an international incident, how did I almost cause the incident? Request that I be allowed to check out conditions at the Saudi camp through my own chain of command. Request that my own chain of command conduct an investigation into the senseless slaughter occasioned by disregard of the GC, when such an inquiry is specifically required by the GC? Does not the foreseeable slaughter of thirsty innocents, excited at the arrival of a water truck, count as an international incident? I am a management problem because I saw it coming and tried to do something about it? I admit I was impatient with incompetence, but the only way to get the Saudis to comply with the Conventions was to transmit a clear message that their behavior was unacceptable. I repeatedly processed requests and complaints through my technical and command chain of command and advised them that the Geneva Conventions were not being followed. The slaughter happened because diplomatic expedience and command influence prevailed over fact and law.

h. When I was the Judge Advocate with Corps-wide operational responsibility for the EPW mission, I obtained 70,000 bottles of water because the EPW masses were uncontrollable without water to placate them. Bulk water simply could not be distributed in a

controlled manner by the few guards we had. I am not exaggerating when I say there were times when I was the only person guarding thousands of EPW. If anyone is interested I'll tell about this and the land mine discovered 10 feet in front of my lead vehicle in a convoy I lead through the breech. I was told "no bottled water for EPWs" and ordered to return what I had. I did not steal the bottled water. A CPL released it to me because I copied the OpOrder and read to her the order overriding the instructions about no bottled water for prisoners. If I would have returned the water, we would have had riots in the EPW holding areas as the Saudis had, in the camp we were "safeguarding". I have witnesses for these events. What I saw and experienced were harsh facts. My response was professional, appropriate, and not overzealous. If the sole criteria in officer rating is deference to the career politics and perception of infallibility emanated by superiors then I am perhaps overzealous and deserve to be fired. If truth and the play a part, my career should be spared.

24. The investigator finds that COL Huffman didn't know about my complaints. From this he concludes that what COL Huffman did to my career could not have been reprisal. I repeatedly communicated with COIL Huffman urging conformance with the Conventions. I went over his head. He had me "replaced" and the investigator wants to say he didn't know about my complaints? I don't believe the investigator even asked LTC Chapman if COL Huffman had anything to do with CPT Lederer replacing me at Rahfa.

a. Assuming that the IG didn't make my complaints known to BG Blackwell, COL Huffman, COL Pomager or LTC Pierce, consider the possibility that he didn't do so because he was able to foresee the type of careful "non-referred" reprisal I would suffer. Assume (for example) he had a wife and kids or a few more years invested in his career and he kept his mouth shut and got safely on the bus to Abelene. Under these facts,

should I be denied whistle blower protection? I pray not, especially when I also went to the Commanding General! The IG worked for the BG Blackwell, the General to whom I also complained.

b. I detailed in my original complaint how COL Huffman was flown, along with the Corps Commander, to Rahfa to answer questions raised by my briefing to BG Blackwell. COL Huffman's advice was overruled by the OG and the PWIC was brought in. The official whose reprisal took my career knew very well my complaints. COL Huffman not only knew of my communications directly, but he acted upon this knowledge when he replaced me as Acting SJA to 2d AD (fwd). It was shortly after my protected disclosures to the OG, 2d AD (fwd) that CPT Lederer arrived. From his telling, he was briefed that "I blew it." Lest there be any doubt that I was replaced as task force command Judge Advocate, I point out that upon my arrival to Rahfa, I was introduced to LTG Chambers, BG Blackwell and others, as the Geneva Convention expert. Further, I was made a part of 2d AD (fwd) task force and not allowed to depart the area, being attached by a General order.

c. I tried to correct or compensate for others careerism gone astray. I may never be one of the old cronies in the JAG Corps, or be a "hero", but I accomplished the mission established by Congress and the American people. I respectfully submit that I should be able to continue to try to retire from whatever lowly office my dedication to duty and the rule of rule might entitle me. I was, and to a certain degree, remain ostracized. I was verbally chastised, humiliated, passed over, now libeled and slandered by senior officers whose activities, or lack thereof, arguably were , and remain, outside the scope of their professional duties. I have not taken an advocate's position and asked for a rewritten OER which acknowledges my theater-wide acting SJA refugee work or a bronze star. I haven't asked for a legion of merit or any other upscale relief. Like all

my grandfathers, father, uncles and cousins, I've just served my country and tried to do what is right. Now I would like some protection for doing the right, albeit unpopular, thing.

d. Finally, as an adjunct to my complaint and the aspirations I have cast as to the competence of my superiors, let me point out that for all my years of military service, 7 years active commissioned service, 3 years enlisted active, 5 years NG and AR service (6 years as an NCO), I have kept my mouth shut and my nose to the grindstone. I have done my duty and never complained. I invoked the whistle blower protection act as a shield, after the mission was accomplished, only after I had been struck down. I would not criticize my superiors for two additional reasons. First. COL Huffman and COL Pomager are good men and normally competent officers. The events simply exceeded their capability level. Alternatively, their rank, position and desire to out-Colonel their peers dulled their ethics, or their desire to raise flags and blow whistles.

e. I believe strongly in respect for superiors and that the Army should function with deference given those who hold positions of authority; those who have the staff and experts to help handle the information. I believed this during the way when I was forced by undeniable facts and circumstances to perhaps do more than they thought they wanted. I knew this when I, at the front, saw or recognized things they did or could not. I perhaps antagonized one or the other or both of them by obeying one or the other when their intents were not congruent. As I pointed out in my initial petition, I frequently was caught between their differences.

f. Because I feel strongly the need to respect superiors, I offered my legal opinions, swallowed my pride and did not argue. I may have asked twice, but I did not argue. I knew my place. Bottom Line. Please understand that then, as now, it is extremely difficult

for me to speak frankly, candidly, yet depreciatingly, of my superiors. It is only after they malign me beyond endurance that I do so.

25. The investigating officer states there was no reprisal.

a. It is obvious that I had my career terminated by a poor OER and the conspicuous lack of "meritorious" service reflected in the timing and nature of my awards. The fact that practically all of COL Huffman's lawyers whose activities entailed less personal risk, no command, and no extraordinary responsibility, received bronze stars, is, I would hope, additional evidence that there was reprisal taken against me. I don't begrudge anyone their awards. In fact, I'm happy and proud for them. But careers are ephemeral things. You can not blame me for mourning the loss of mine. Awards, such minor trinkets of appreciation for such hard work. As the demise of my career demonstrates, awards require great relative significance, as these paper records of many years of hard work, define who shall survive.

b. I knew I would not receive the "favor" of a bronze star when I offered professional advice contrary to my superiors. I understood that. This to me is the cost of doing what is right or being aware of and trying to remedy what is wrong in this world. I was threatened with reprisal even before I spoke with BG Blackwell. I could hear it in COL Huffman's ominous tone of voice as he told me to "leave it alone", "we're getting out of here". I can't go any further in proving this threatened reprisal. I do believe these "threats" provide an independent basis to afford me whistle blower protection. O described these factors in my original petition for whistle blower protection. Perhaps the ABCMR could find it in their hearts and jurisprudence to believe me? My actions are only made to seem strident. I too read the IG report and see that I am painted as one who does not deserve relief. But they do not paint truly. My actions were professionally and ethically conceived and

delivered. They were all painful decisions of conscience. I am not psychic, but I am not stupid. I knew BG Blackwell did not want to hear my advice regarding what needed to be done to comply with the GC.

c. After my discussion with BG Blackwell, COL Huffman browbeat me with inaccurate characterizations of my conversation with BG Blackwell. I accepted his self-righteous, inaccurate beratement with sadness. I felt this humiliation again as I read MAJ Talbot's "interview" testimony regarding what he had heard: That I had told BG Blackwell he would go to jail if he did not do as I advised. What MAJ Talbot heard and recounted is not true. My description of my discussion with BG Blackwell in my original petition was accurate. I understood I faced an uphill battle. I face one now. This is the reason that I require access to the investigations, allegations, evidence and innuendo being marshaled behind the scenes. Under the American rule of law, before the ABCMR, I should not, under the circumstances, lose my career.

26. In summary, I appeal to the ABCMR. I request an opportunity to appear before the ABCMR, to call witnesses, and to discover the entire IG investigation, as well as collateral and related investigations. I also request the appointment of legal counsel to assist me. Finally, I reserve the right to supplement this request for discovery, and to provide further evidence and related, requests for relief. I apologize for the great length of my submissions. With knowledge of the penalty for false official statements, I affirm the truth of the statements I have made in the preceding 29 paragraphs.

Sgd.
Paul D. Kerian
Captain, JA
Chief, Criminal Law

APPENDIX J

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON, VA 22202-4508

MEMORANDUM OF CONSIDERATION

IN THE CASE OF:KERIAN, PAUL D. 7412

BOARD DATE: 31 January 1996
DOCKET NUMBER: AC93-05228A

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present:

Mr. Charles H. Loundermon Chairperson
Mr. Franklin R. Taylor Member
Ms. Karen L. Wolff Member
Also present, without vote, were:

Mr. David R. Kinneer Executive Secretary
Ms. Marjorie G. Davis Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairperson on the above date. In accordance with Army Regulation 15-185, the application and the available military records pertinent to the corrective action requested were reviewed to determine whether to authorize a formal hearing, recommend that the records be corrected without a formal hearing, or to deny the application without a formal hearing if it is determined that

insufficient relevant evidence ; been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records

Exhibit B - Military Personnel Records (including advisory opinion, if any)

ABCMR Memorandum of Consideration (cont) AC93-05228A

APPLICANT REQUESTS: In effect, that the action by the Officer Special Review Board (OSRB) be changed. Initially, he appealed the Inspector General's (IG) denial of protection under the Military Whistleblower Protection provisions, and he requested that the senior rater portion of the officer evaluation report (OER) covering the period December 1990 through May 1991 be rewritten by removing the derogatory comment accusing him of "overzealousness;" that the numerical senior rating be elevated to the top block; that his entire military record be referred to a "relook" promotion board; and that he be awarded an end-of-tour Meritorious Service Medal (MSM) for his overseas tour ending July 1991. Also, he requested a personal hearing before the Board, and access to the IG investigating officer's complete report, as well as the appointed counsel which he was denied by the IG's denial of whistleblower protection.

APPLICANT STATES: In effect, in a comprehensive statement, he explains the facts and circumstances that occurred while he was serving in Southwest Asia during Operation Desert Shield/Desert Storm. He

filed a petition with the Department of Defense IG's (DODIG) office invoking the Military Whistleblower Protection Act. (Note: It was sent to the Department of the Army IG (DAIG)). He alleges that the IG investigation was slow, superficial, and inaccurate, and that he was not personally interviewed by the IG investigator. He indicates that the whistleblower protection petition was circulated behind the scenes, resulting in a compromised investigation and orchestrated results. It is difficult for him to ignore the possibility that these rumors and prejudicial disclosures may have contributed to his nonselection to the rank of major (MAJ) in the active component. The reprisals that he has suffered resulted from his provision of legal advice based upon life and death realities and incontrovertible, fundamental law. He refused to render specific legal advice based upon command directed or diplomatic characterizations unrelated to reality. In return for the extra work and slight embarrassment resulting from his legal counsel, which was at odds with that of his technical chain, he has suffered great humiliation. Because of the pressures, lack of whistleblower protection, and the threat of involuntarily separation (with its attendant stigma and financial loss) he had no meaningful choice but to leave the Army.

EVIDENCE OF RECORD: The applicant's military records show:

The applicant was born on 26 February 1956. On 24 March 1965, he accepted an appointment in the U.S. Army Reserve (USAR) in the rank of first lieutenant (1LT). He served on active duty from 24 March 1985 through 25 February 1993. He was released from active duty in the rank of captain (CPT).

He attended the 107th Basic Course, in the rank of 1LT, during the period 8 April through 14 June 1985, and exceeded course standards.

During the period December 1990 through May 1991, the applicant was the Judge Advocate for the 14th Military Police Brigade, VII Corps, for Operation Desert Shield/Desert Storm. He was involved in the planning, training, and conduct of enemy prisoner of war and civilian refugee actions within the VII Corps area of responsibility and normal legal services.

A Recommendation for Award (other than valor), dated 31 March 1991, indicates that the applicant was recommended for an Army Commendation Medal (ARCOM) for the period 9 November 1991 (sic) (year should have been 1990) through 25 March 1991.

On 20 November 1991, the applicant sent a memorandum to the DAIG requesting an investigation and Military Whistleblower Protection under title 10, U.S. Code, section 1034 (10 USC 1034). He explained the facts and circumstances that had occurred. He indicated, in pertinent part, that, in performing his missions, he was forced to frequently compensate for violations of law which his senior rater would not take action to correct. For his actions in making known his senior rater's dereliction, the senior rater retaliated against him. The alleged reprisal actions were a substandard evaluation report, denial of an appropriate award for his Operation Desert Shield/Desert Storm service, and an end-of-tour award for having contacted an IG concerning alleged Geneva Convention violations.

As a result of the applicant's complaint that he was subjected to multiple instances of reprisal after disclosing alleged Geneva Convention violations which occurred in Southwest Asia within the VII Corps area of responsibility, an investigation was conducted by the DAIG. The List of Exhibits shows that the DAIG investigator telephonically interviewed the applicant on 14 February 1992. The applicant indicates that he could not find his copy of

that interview. A staff member of the Board was informally advised by the authorities at the DAIG that their copy of that interview has been destroyed in accordance with their filing disposition procedures. The authorities at the DODIG advised a staff member of the Board that they did not have a copy of that interview.

During the investigation, the DAIG investigator was advised by the IG, 2d Armored Division (Forward), that he remembered meeting the applicant once in the hall outside his billets; that the applicant did not make a complaint or talk about any problems that he was having; that the conversation was very general in nature, consisting of chit-chat about living conditions, how the war had gone, how long they had been in the desert, etc.; that he was aware through second or third-hand information that the applicant and the Commanding General, 2d Armored Division (Forward), had words about the Geneva Convention; that the applicant told the Commanding General that he would go to jail unless he followed the applicant's advice; and that the applicant did not talk with him, nor did he receive any communication from the applicant at a later time.

During the investigation, the DAIG investigator was advised by the senior rater that he rated the applicant solely on his demonstrated duty performance; that the applicant was almost relieved by the Commander, 14th Military Police Brigade; that the applicant caused more management problems than any other officer in the desert; and that he had an obligation to accurately reflect the applicant's duty performance in his senior rater comments and rating.

During the investigation, the DAIG investigator was advised by the Commander, 14th Military Police Brigade, that he almost relieved the applicant while in Southwest Asia; that the applicant wanted things done his way, and no other way would do; that the applicant briefed everyone who would listen about how he felt operations should

occur; that the applicant almost caused an international incident over the Saudi treatment of refugees and his insistence that he be allowed to inspect the Saudi operation; and that, because of the applicant's type of behavior, he would have rated the applicant well below the rest of his officers, with a comment questioning the applicant's potential for further service.

During the investigation, the DAIG investigator was advised by the VII Corps Judge Advocate that personnel who were not in supervisory positions were usually recommended for and received ARCOM's, while personnel in supervisory positions usually were recommended for and received MSM's; that the applicant was not an officer-in-charge of a section placing him in a supervisory position; that the applicant was recommended for a MSM as his end-of-tour award; that the VII Corps Judge Advocate only recommended that the applicant receive an ARCOM as his end-of-tour award; that his recommendation was based on his personal knowledge of the applicant's entire tour performance, including the fact that the applicant had to be reassigned twice based on personality conflicts; that the VII Corps approved the applicant for an ARCOM for his end-of-tour award; and that the action was based on demonstrated duty performance and not in reprisal for having contacted an IG.

The DAIG concluded that the allegation of reprisal was not substantiated, and that no evidence was found that the applicant's substandard evaluation report, his Operation Desert Storm award, or his end-of-tour award were influenced or occurred as a result of his alleged whistleblowing activities.

On 23 June 1992, the DODIG advised the applicant that the DAIG had completed its investigation under 10 USC 1034; that the investigation concluded that the personnel actions were legitimate and not taken in reprisal for

communicating to a member of Congress or an IG; that the DODIG had reviewed the report of investigation and determined that it was adequate; and that he could apply to this Board. The DODIG furnished the applicant a copy of the report of investigation edited to exclude information not releasable under the provisions of the Freedom of Information Act.

On 11 December 1992, the DAIG responded to the applicant's 20 November 1991 letter concerning the alleged failure of the 14th Military Police Brigade to fully comply with certain provisions of the Geneva Conventions. He was advised that their inquiry failed to reveal any violations of the Law of War. He was furnished the answers to the questions that he raised regarding the rules for the care and handling of refugees in Southern Iraq during Operation Desert Storm.

During the periods 15 June 1985 through 24 January 1993, the applicant received the ratings shown below. The rating system depicted below has six entries: the first two entries are derived from the rater performance and potential blocks, expressed in Roman numerals, with I the highest and V the lowest; the last four entries are derived from the senior rater potential evaluation (senior rater profile), with the third entry reflecting the applicant's standing in a bell-shaped distribution pattern of 100 officers of the same grade (i.e. top, top two through eight, and bottom), and the fourth through sixth entries portraying, respectively, the number of officers ranked above, equal to, and below the applicant).

Period	Rank	Position	Ratings
15 Jun 85-12 Jul 85	CPT	TrialDefense Counsel	
I/I/Top3/0/0/0			
"	10 Nov 85-30 May 86	"	"
I/I/Top2/I/4/3			
31 May 86-12 Jan 87	"	"	
I/I/Top2/5/12/3			

13 Jan 87-21 Jun 87	"	Assistant	Staff
I/I/Top3/12/16/1	Judge Advocate		(SJA)
22 Jun 87-21 Mar 88	"	"	I/I/Top2/I/2/I
15 Mar 88-30 Jun 88	"	Legal	I/I/Top2/3/6/1
	Assistance	Officer	
1 Jul 88-30 Jun 89	"	Legal	I/I/Top2/10/13/5
	Assistance	Attorney	
1 Jul 89-5 Jun 90	"	Trial Counsel	I/I/Top2/0/8/2
6 Jun 90-5 Dec 90	"	"	I/I/Top2/I/19/2
6 Dec 90-12 May 91	"	Brigade Judge	I/I/*
		Advocate	
13 May 91-15 May 92**			
16 May 92-24 Jan 93	"	Chief, Criminal	I/I/Top/0/1/12.
		Law	
24 Jan 94-4 Feb 94	MAJ	Assistant SJA	I/I/Top2/0/0/0***

The applicant's Official Military Personnel File indicates that he received three ARCOM's for the periods 15 July 1985-15 July 1988, 9 November 1990-12 April 1991, and August 1989-July 1991; and one MSM for the period 20 May-31 December 1992.

On 19 February 1993, in response to the applicant's initial application to this Board, dated 8 December 1992, and a letter, dated 27 December 1992, the applicant was advised by the Executive Secretary of the Board, in pertinent part, that the DAIG investigator had concluded that the personnel actions that the applicant had identified as having been taken in reprisal were legitimate and not taken in reprisal for communicating to a member of Congress or an IG; that the DODIG had determined that the DAIG's investigation was adequate; that he was furnished a copy of the report of investigation edited to exclude information not releasable under the provisions of the Freedom of Information Act; that legal counsel could not be appointed to assist him in view of the DODIG decision; that the Board did not have the authority to furnish him

*The applicant was serving in Southwest Asia during Operation Desert Shield/Desert Storm. The OSRB removed the senior rater's profile and comments.
**The applicant attended the 40th Graduate Course at the Judge Advocate General's School, which was a 42 week course leading to the award of a Master of Laws degree in Military Law.
***The applicant was serving on an active duty for training tour during this period. This OER shows the applicant's rank was MAJ, USAR, with a date of rank as 25 February 1992.

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access to the IG investigating officer's complete report to include any and all tape records of the IG investigating officer's interviews; that he would have to apply to the DAIG to determine if those items could be released to him; that he would have to reapply to the DAIG if he desired a further investigation; that, as a general rule, a formal hearing is granted only in those cases where testimony and additional information is essential for the Board to adjudicate the case; that he needed to exhaust his administrative remedies by appealing the OER to the OSRB; that he had to submit evidence to substantiate his request regarding an end-of-tour MSM for his overseas tour ending July 1991; that, since he indicated that he desired to supplement his request for discovery and to provide further evidence and related requests for relief, his application was returned without prejudice and without action being taken by the Board; and that, once he had exhausted his administrative remedies, he could resubmit his application.

The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) indicates that he was honorably released from active duty on 25 February 1993, in the rank of CPT, under Army Regulation 635-100, chapter 3, section XVI (early release program, with entitlement to the voluntary separation incentive of $11,233.89 annually for 22 years. He had completed a total of 11 years, 2

months, and 10 days active military service, and 6 years, 6 months, and 5 days inactive military service. He received the following decorations and awards: the MSM, the ARCOM (two oak leaf clusters), the Army Achievement Medal, the Good Conduct Medal, the National Defense Service Medal, The Kuwait Liberation Medal (Saudi Arabia), the Southwest Asia Service Medal with three bronze stars, the Humanitarian Service Medal, the Army Service Ribbon, the Overseas Service Ribbon (two), the Aircraft Crewman Badge, and the Army Reserve Component Overseas Tour Ribbon.

On 30 November 1993, the applicant submitted an appeal of the contested OER. He explained the facts and circumstances that occurred during the rating period. He indicated that the person who senior rated him was not his senior rater; that the possibility of the VII Corps SJA becoming his senior rater was never considered or discussed until April; that, to conform the refugee mission to the law, he was required to take extraordinary measures; and that his unique vantage provided him with facts which ethically forced him to jump his technical and belated senior rating chain of command. Also, he indicated that he reported to the Criminal Investigation Division evidence of an improper and illegal course of conduct involving the brigade commander and his command. (Note: There is no evidence in the available documentation regarding this.)

On 23 August 1994, a Case Summary was prepared by the OSRB on the applicant's appeal of the contested OER. It indicated that the applicant had been a two time nonselect for promotion to the rank of MAJ. The OSRB contacted the rater who indicated that, within 90 days of her arrival in January 1991, the brigade commander had agreed to change the applicant's rating scheme to designate the VII Corps SJA as the senior rater, which would enable a "JAG officer" to be in the applicant's rating scheme; that she advised the applicant of the change of senior rater; that, at the

end of the rating period, the brigade commander relinquished his senior rater position on the applicant to the VII Corps SJA who then acted as the applicant's senior rater; and that she was not exactly sure when the decision was made to change senior raters.

The OSRB contacted the brigade commander who indicated that he felt that because of the nature of the work that he would face as the Corps Provost Marshal in a combat "Theatre," he (law officer) and the applicant (legal advisor) could find themselves at odds and or in disagreement on issues; that he intentionally took himself out of the rating chain for the applicant to ensure fairness to the applicant; that he felt that the Corps SJA, the Corps' senior legal officer, would be better as the senior rater; that he believed that the Corps SJA had an opportunity at least twice a week to be aware of the applicant's performance; and that he could not remember if or when an official rating scheme change for the applicant was made and could not remember exactly when the official change in the senior raters occurred.

The OSRB contacted the senior rater who indicated that he became the applicant's senior rater primarily because of a change in the legal jurisdiction of Corps units; that he discussed it with the brigade commander who agreed that he should be the applicant's senior rater due to the change of relationship, as well as for the concern by the brigade commander of possible conflict between the Corps Provost Marshal and his brigade SJA; that he had numerous opportunities to observe and/or be apprised of the applicant's performance; that, over some periods, he personally saw the applicant weekly; that, on at least three occasions over the rating period in question, he specifically spoke with the applicant on "how he was doing;" and that he felt that he had sufficient exposure to the applicant to properly evaluate him.

After carefully considering the applicant's appeal and the information obtained, the OSRB concluded

that the VII Corps SJA became the applicant's senior rater and that the applicant was aware of it. However, given the fact that the VII Corps SJA was the applicant's senior rater, the question of sufficient time as the senior rater had to be addressed. To evaluate the rated officer, the senior rater must normally serve in that capacity for a minimum of 60 calendar days. The OSRB determined, based on the information provided by the applicant, the rater, the senior rater, and the brigade commander, that the VII Corps SJA was not the applicant's senior rater for a period of 60 calendar days prior to the ending date of the period covered by the contested OER. Therefore, the VII Corps SJA did not have the required number of days as the senior rater to effect his rating. The OSRB partially approved the applicant's appeal. The OSRB recommended that the block mark be deleted and the senior rater profile be removed in Part VIIa (Senior Rater's Potential Evaluation), and that the comments in Part VIIb (Senior Rater's Comments) be removed in its entirety and replaced with the statement: "I am unable to evaluate the rated officer because I have not been his senior rater for the required number of days." The OSRB also determined that promotion reconsideration was not warranted because of the change to the applicant's file. The OSRB indicated that it was not convinced that there would have been a reasonable chance for selection had the change been made before the applicant was considered.

On 29 August 1994, the U.S. Total Army Personnel Command advised the applicant that his records were corrected in accordance with the decision of the OSRB.

The applicant wrote to the DODIG on 12 September and 25 October 1994. He made allegations that an Army OSRB did not grant the appropriate relief on his appeal of an OER for the period ending May 1991, and that the OSRB members reprised against him for his earlier whistleblowing activity. He requested that the DODIG interview the OSRB members prior to conducting their interview with

him. On 19 December 1994, the DODIG advised the applicant that they would not comply with his request for the following reason. When they receive a complaint of reprisal, they first conduct a preliminary inquiry to determine whether the allegations meet the guidelines of 10 USC 1034, and whether further investigation is warranted. To this end, it is the complainant's responsibility to ensure that they have the necessary facts to make that determination. Consequently, they would not proceed further with his case until such time as he provided that information. He was advised to furnish the requested information by 6 January 1995 or else no further action would be taken on his case.

On 29 December 1994, the applicant wrote to the DODIG regarding their request that he provide additional information to assist them in evaluating his complaint. He expressed disagreement with what he perceived to be their refusal to investigate his case. He also criticized members of the OSRB for communicating with senior raters who allegedly reprised against him by giving him a downgraded OER.

On 31 January 1995, the DODIG advised the applicant that, contrary to his assertion, they had not refused to investigate his case nor had they asked him to conduct a preliminary inquiry of his allegation of reprisal. However, they had requested him to provide some basis for his allegation that OSRB members reprised against him for his protected disclosure to an IG. Absent any reasonable basis to believe a motive for reprisal existed, they did not conduct an investigation based on pure speculation regarding the decisions of boards established by department regulations. In that regard, they determined that the OSRB members were allowed to contact other individuals while evaluating an appellant's claim. Specifically, Army Regulation 623-105 provides that board members "may obtain more information from the appellant, the rating officials, persons in the chain of command, or anyone thought to have firsthand knowledge of the case."

Further, that regulation does not require OSRB members to consult with the appellant regarding contacts with individuals who may have knowledge of the appellant's evaluation. The DODIG offered the applicant the opportunity to provide additional information regarding his complaint of reprisal. He was advised to furnish the requested information by 18 February 1995 or else they would close the matter as untimely. Also, he was advised to apply to this Board if he had not yet done so. On 7 March 1995, the DODIG advised the applicant that his cooperation in providing pertinent information was imperative. Because they had not heard from him by 18 February 1995, they were closing his case without further action.

The DOD Directive Number 7050.6, dated 20 November 1989, covered the Military Whistleblower Protection Act (10 USC 1034). This directive was reissued on 3 September 1992. The directive indicates that it is DOD policy that no person shall restrict a member of the Armed Forces from lawfully communicating with a Member of Congress, an IG, or a member of a DOD audit, inspection, investigation, or law enforcement organization; that members of the Armed Forces shall be free from reprisal for making or preparing to make lawful communications to a Member of Congress, an IG, or a member of a DOD audit, inspection, investigation, or law enforcement organization; and that no employee or member of the Armed Forces may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing a lawful communication to a Member of the Congress, an IG, or a member of a DOD audit, inspection, investigation, or law enforcement organization. (Note: This directive was reissued again on 12 August 1995 to include specific other complaints as protected communications and expand the scope of persons and activities to whom a protected communication could be made.)

Army Regulation 623-105, then in effect, established the policies and procedures for the Officer Evaluation Reporting System. Paragraph 3-10 provided, in pertinent part, that, to evaluate the rated officer, the senior rater must normally serve in that capacity for a minimum of 60 calendar days.

Army Regulation 672-5-1, then in effect, provided the Department of the Army policy, criteria, and administrative instructions concerning individual military decorations. Chapter 2 provided, in pertinent part, that military decorations were awarded in recognition of heroism, meritorious achievement, or meritorious service . . . The decision to award an individual a decoration and the decision as to which award was appropriate were both subjective decisions made by the commander having award approval authority . . . The MSM was awarded to any member of the Armed Forces of the United States . . . who, while serving in a noncombat area after 16 January 1969, had distinguished himself or herself by outstanding meritorious achievement or service. . . The ARCOM was awarded to any member of the Armed Forces of the United States who, while serving in any capacity with the Army after 6 December 1941, distinguished himself/herself by heroism, meritorious achievement, or meritorious service . . .

DISCUSSION: Considering all the evidence, allegations, and information presented by the applicant, together with the evidence of record, applicable law and regulations, it is concluded:

1. In order to justify correction of a military record, the applicant must show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the record is in error or unjust. The applicant has failed to submit evidence that would satisfy the aforementioned requirement.

2. The Board notes that the DAIG conducted an investigation. Although a copy of the telephonic interview between the DAIG investigator and the applicant is now unavailable, the evidence indicates that the applicant was interviewed on 14 February 1992. The DAIG investigation concluded that the allegation of reprisal was not substantiated. The DAIG found no evidence that the applicant's substandard evaluation report, his Operation Desert Storm award, or his end-of-tour award were influenced or occurred as a result of his alleged whistleblowing activities. Also, the Board notes that the DODIG reviewed the DAIG's report of investigation and found it to be adequate. Further, the DODIG did not do a subsequent investigation since the applicant did not submit requested information to them.

3. The Board has reviewed the investigation of the DAIG, documentation provided by the DODIG, the Case Summary provided by the OSRB, the documentation submitted by the applicant, and his military records. Based on the evidence of record and the available documentation, the Board concurs with the DAIG and the DODIG that the allegation of reprisal was not substantiated. Accordingly, his case was considered by this Board, not as a whistleblower case, but as any other application submitted to the Board alleging error or injustice, as provided by 10 USC 1552.

4. The Board found no evidence that the applicant's contested OER, his receiving an ARCOM for his service during Operation Desert Shield/Desert Storm, or his receiving an ARCOM for his end-of-tour award were influenced or occurred as a result of his alleged whistleblowing activities.

5. After evaluating the OSRB's Case Summary and the applicant's statements in rebuttal to the Case Summary, the Board is convinced that the VII Corps SJA was the applicant's senior rater, and that he was not the

applicant's senior rater for a period of 60 calendar days prior to the ending date of the period covered for the contested OER. Therefore, the actions recommended by the OSRB were correct in regards to the contested OER.

6. There is no evidence in the record, nor has the applicant provided any evidence, to show that the contested OER was the sole basis for his nonselection for promotion to the rank of MAJ in the active component. The Board must presume that the applicant's overall record of service, when compared to those of his contemporaries, simply was not strong enough to place him among those selected for promotion.

7. Based on the applicant's OER record, the Board concludes that there would not have been a reasonable chance for his selection had the change been made to the contested OER before he was considered. Therefore, there is no basis to refer his records to a special selection board for reconsideration for promotion to the rank of MAJ in the active component.

8. The Board notes that the applicant was promoted in the USAR to the rank of MAJ, with a date of rank of 25 February 1992.

9. In view of the foregoing, there is no basis for granting the applicant's requests.

DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice. BOARD VOTE:

_____ _____ _____ GRANT _____
_____ _____ _____ GRANT FORMAL HEARING
__S/___ __S/___ __S/___ DENY

APPLICATION /S/ David R. Kinneer
Executive Secretary

APPENDIX K DEPARTMENT OF THE ARMY

BOARD CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON, VA 22202-4508

SFMR-RBR
KERIAN, PAUL D. (OMITTED) 7412 SS#

MAJ Paul D. Kerian, USAR
195 East Argyle Street
Valley Stream, New York 11580

Dear Major Kerian:

This concerns your application for correction of military records in which your alleged, in effect, reprisal for making or preparing a protected disclosure.

The Department of Defense Inspector General (DODIG) advised you 23 June 1992 that the Department of the Army Inspector General (DAIG) completed its investigation under title 10, U.S. Code, section 1034; hat the investigation concluded that the personnel actions were legitimate and not taken in reprisal for communicating to a member of Congress or an IG; and that it had reviewed the report of investigation and determined that it was adequate. On 19 December 1994, the DODIG advised you that it was your responsibility to ensure that the DODIG had necessary facts to make a determination, and that you were requested to furnish additional information by 6 January 1995 or else no further action would be taken in your case. On 31 January 1995, the DODIG advised you that, contrary to your assertion, it had not refused to investigate your case; that it had requested that you provide some basis for your allegation; and that you were requested to furnish the requested information by 18 February 1995 or it would close the matter as untimely. On 7 March 1995, the DODIG advised you you that, since it had not heard from you, it was closing your case without further action. Since your allegations

of reprisal were unsubstantiated, you are not entitled to the special protection afforded to whistleblowers under the special protection afforded to whistleblowers under DOD Directive 7050.6 or tile 10, U.S. Code, section1034.

In view of the foregoing, your application was processed as a request for correction of your military records, under title 10, U.S. Code, Section 1552. The Board for Correction of Military Records considered the DAIG investigation, the Documentation provided by the DODIG, the case Summary provided by the Officer Special Review Board in the office of the Deputy Chief of Staff for Personnel, the documentation submitted by you, and your military records. The board concurred with the DAIG and DODIG that the allegations of reprisal was not substantiated, and that you had not otherwise shown that error or injustice exists in your records. Therefore, your application was denied under the administrative procedures approved by th e Secretary of the Army for the operation of the Board. A copy of the Memorandum of consideration, which contains the Board's reasons for denial, is enclosed.

Only if you can present newly discovered relevant evidence that was not available for consideration by the board when it denied your application will there be a basis for reconsideration. Detailing your disagreement with the decision or repeating previous contentions would not amount to new material evidence sufficient to justify reconsideration. If a request for reconsideration is submitted, the staff of the Board will evaluate the request and any new evidence and make that determination at the appropriate time. Otherwise, this decision is final. The only remaining avenue of appeal, should you desire to pursue it, would be in Federal Court.

I regret that my letter could not be favorable.
Sincerely, signed David R. Kineer Executive Secretary
Enclosure

APPENDIX L

18 U. S. Code, Chapter 18, § 2441. War crimes

(a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in 101 of the Immigration and Nationality Act).

(c) Definition.— As used in this section the term "war crime" means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the U. S. is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II

as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

APPENDIX M

10 USC Sec. 1552 (a). Correction of military records: claims incident thereto:

(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the
promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal

representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the
claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made bya legal representative, the money shall be paid - (1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment. A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the
payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who,
because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or
reappointment, the Secretary

concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to - (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

APPENDIX N

10 USC 1034 Military Whistleblower Protection Act

Sec. 1034. - Protected communications; prohibition of retaliatory personnel actions

(a) Restricting Communications With Members of Congress and Inspector General Prohibited. -

(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of Retaliatory Personnel Actions. -

(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal

against a member of the armed forces for making or preparing -

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to -

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

(iii)a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or

(iv)any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.

(2) Any action prohibited by paragraph (1) (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General Investigation of Allegations of Prohibited Personnel Actions. -

(1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (3).

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3)(A) An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine, in accordance with regulations prescribed under subsection (h), whether there is sufficient evidence to warrant an investigation of the allegation.

(B) If the Inspector General receiving such an allegation is an Inspector General within a military department, that Inspector General shall promptly notify the Inspector General of the Department of Defense of the allegation. Such notification shall be made in accordance with regulations prescribed under subsection (h).

(C) If an allegation under paragraph (1) is submitted to an Inspector General within a military department and if the determination of that Inspector General under subparagraph (A) is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.

(D) Upon determining that an investigation of an allegation under paragraph (1) is warranted, the Inspector General making the determination shall expeditiously investigate the allegation. In the case of a determination made by the Inspector General of the Department of Defense, that Inspector General may delegate responsibility for the investigation to an appropriate Inspector General within a military department.

(E) In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).

(4) Neither an initial determination under paragraph (3)(A) nor an investigation under

paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

(5) The Inspector General of the Department of Defense, or the Inspector General of the Department of Transportation (in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy), shall ensure that the Inspector General conducting the investigation of an allegation under this subsection is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

(d) Inspector General Investigation of Underlying Allegations. -

Upon receiving an allegation under subsection (c), the Inspector General receiving the allegation shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A) or (B) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate. In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned.

(e) Reports on Investigations. -

(1) After completion of an investigation under subsection (c) or (d) or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E), the Inspector General conducting the investigation shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and shall transmit a copy of the report

on the results of the investigation to the member of the armed forces who made the allegation investigated. The report shall be transmitted the Secretary, and the copy of the report shall be transmitted to the member, not later than 30 days after the completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E).

(2) In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.

(3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice -

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a

recommendation as to the disposition of the complaint.
(f) Correction of Records When Prohibited Action Taken. -
(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.
(2) In resolving an application described in paragraph (1), a correction board -
(A) shall review the report of the Inspector General submitted under subsection (e)(1);
(B) may request the Inspector General to gather further evidence; and
(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.
(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1) -
(A) may be provided with representation by a judge advocate if -
(i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);
(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and
(iii) the member is not represented by outside counsel chosen by the member; and
(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence,

including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).

(4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

(g) Review by Secretary of Defense. -

Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

(h) Regulations. -

The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.

(i) Definitions. -

In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.
(2) The term "Inspector General" means any of the following:
(A) The Inspector General of the Department of Defense.
(B) The Inspector General of the Department of Transportation, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.
(C) Any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.
(3) The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin

SOURCE Aug. 10, 1956, ch. 1041, 70A Stat. 80 Pub. L. 98-525, title XIV, Sec. 1405(19)(A), (B)(i), Oct. 19, 1984, 98 Stat. 2622 Pub. L. 100-456, div. A, title VIII, Sec. 846(a)(1), Sept. 29, 1988, 102 Stat. 2027 Pub. L. 101-225, title II, Sec. 202, Dec. 12, 1989, 103 Stat. 1910 Pub. L. 103-337, div. A, title V, Sec. 531(a)-(g)(1), Oct. 5, 1994, 108 Stat. 2756-2758 Pub. L. 105-261, div. A, title IX, Sec. 933, Oct. 17, 1998, 112 Stat. 2107 Pub. L. 106-398, Sec. 1 ((div. A), title IX, Sec. 903), Oct. 30, 2000, 114 Stat. 1654, 1654A-224.
Historical and Revision Notes Revised section

Source (U.S. Code)Source (Statutes at Large)

1034 50 App.:454(a) (last par.)

June 24, 1948, ch. 625, Sec. 4(a) (last par.); restated June 19, 1951, ch. 144, Sec. 1(d) (last par.), 65 Stat. 78.The words "prevented", "directly or indirectly", "concerning any

subject", "or Members", and "and safety" are omitted as surplusage. The word "unlawful" is substituted for the words "in violation of law"

REFERENCES IN TEXT

The Inspector General Act of 1978, referred to in subsec. (b)(1)(B)(ii), is Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

2000 - Subsec. (c)(3)(A). Pub. L. 106-398, Sec. 1 ((div. A), title IX, Sec. 903(a)), inserted ", in accordance with regulations prescribed under subsection (h)," after "shall expeditiously determine".

Subsec. (i)(2). Pub. L. 106-398, Sec. 1 ((div. A), title IX, Sec. 903(b)(1)), inserted "any of" after "means" in introductory provisions.

Subsec. (i)(2)(C) to (G). Pub. L. 106-398, Sec. 1 ((div. A), title IX, Sec. 903(b)(2), (3)), added subpar. (C) and struck out former subpars. (C) to (G) which read as follows: "(C) The Inspector General of the Army, in the case of a member of the Army. "(D) The Naval Inspector General, in the case of a member of the Navy. "(E) The Inspector General of the Air Force, in the case of a member of the Air Force. "(F) The Deputy Naval Inspector General for Marine Corps Matters, in the case of a member of the Marine Corps. "(G) An officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces." 1998 - Subsec. (b)(1)(B)(ii). Pub. L. 105-261, Sec. 933(f)(2), substituted "subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978" for "subsection (j))". Subsec. (c)(1). Pub. L. 105-261, Sec. 933(a)(1)(A), added par. (1) and struck out former par. (1) which read as follows: "If a member of the armed forces submits to the Inspector General of the Department of Defense (or the Inspector General of the Department of Transportation, in the case of a member of the

Coast Guard when the Coast Guard is not operating as a service in the Navy) an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall expeditiously investigate the allegation. If, in the case of an allegation submitted to the Inspector General of the Department of Defense, the Inspector General delegates the conduct of the investigation of the allegation to the inspector general of one of the armed forces, the Inspector General of the Department of Defense shall ensure that the inspector general conducting the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action."

Subsec. (c)(2)(B). Pub. L. 105-261, Sec. 933(b), substituted "Gross mismanagement" for "Mismanagement".

Subsec. (c)(3) to (5). Pub. L. 105-261, Sec. 933(a)(1)(B), added pars. (3) to (5) and struck out former par. (3) which read as follows: "The Inspector General is not required to make an investigation under paragraph (1) in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation."

Subsec. (d). Pub. L. 105-261, Sec. 933(a)(2), inserted "receiving the allegation" after ", the Inspector General" and "In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned." at end.

Subsec. (e)(1). Pub. L. 105-261, Sec. 933(c)(1), substituted "After completion of an investigation under subsection (c) or (d) or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E), the Inspector General conducting the investigation shall submit a report on" for "Not later than 30 days after completion of an investigation under

subsection (c) or (d), the Inspector General shall submit a report on" and inserted "shall transmit a copy of the report on the results of the investigation to" before "the member of the armed forces" and "The report shall be transmitted to the Secretary, and the copy of the report shall be transmitted to the member, not later than 30 days after the completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E)." at end.

Subsec. (e)(2). Pub. L. 105-261, Sec. 933(c)(2), substituted "transmitted" for "submitted" and inserted at end "However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member."

Subsec. (e)(3). Pub. L. 105-261, Sec. 933(c)(3), substituted "180 days" for "90 days".

Subsec. (h). Pub. L. 105-261, Sec. 933(f)(1), redesignated subsec. (i) as (h).

Pub. L. 105-261, Sec. 933(d), struck out heading and text of subsec. (h). Text read as follows: "After disposition of any case under this section, the Inspector General shall, whenever possible, conduct an interview with the person making the allegation to determine the views of that person on the disposition of the matter."

Subsec. (i). Pub. L. 105-261, Sec. 933(f)(1), redesignated subsec. (j) as (i). Former subsec. (i) redesignated (h).

Subsec. (j). Pub. L. 105-261, Sec. 933(f)(1), redesignated subsec. (j) as (i).

Subsec. (j)(2). Pub. L. 105-261, Sec. 933(e), substituted "means the following:" for "means - " in introductory provisions, added subpars. (A) to (F), redesignated former subpar. (B) as (G) and substituted "An

officer" for "an officer" in that subpar., and struck out former subpar. (A) which read as follows: "an Inspector General appointed under the Inspector General Act of 1978; and".
1994 - Pub. L. 103-337, Sec. 531(g)(1), substituted "Protected communications" for "Communicating with a Member of Congress or Inspector General" in section catchline.
Subsec. (b). Pub. L. 103-337, Sec. 531(a), inserted "(1)" before "No person may take", substituted "or preparing - " for "or preparing a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted.", added subpars. (A) and (B), inserted "(2)" before "Any action prohibited", and substituted "paragraph (1)" for "the preceding sentence".
Subsec. (c). Pub. L. 103-337, Sec. 531(b)(3), substituted "Allegations of Prohibited Personnel Actions" for "Certain Allegations" in heading.
Subsec. (c)(1). Pub. L. 103-337, Sec. 531(b)(1), inserted at end "If, in the case of an allegation submitted to the Inspector General of the Department of Defense, the Inspector General delegates the conduct of the investigation of the allegation to the inspector general of one of the armed forces, the Inspector General of the Department of Defense shall ensure that the inspector general conducting the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action."
Subsec. (c)(2). Pub. L. 103-337, Sec. 531(b)(2), added par. (2) and struck out former par. (2) which read as follows: "A communication described in this paragraph is a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted in which the member of the armed forces makes a complaint or discloses information that the member reasonably believes constitutes evidence of - "(A) a violation of a law or regulation; or "(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Subsec. (c)(4).

Pub. L. 103-337, Sec. 531(c)(2), struck out par. (4) which read as follows: "If the Inspector General has not already done so, the Inspector General shall commence a separate investigation of the information that the member believes evidences wrongdoing as described in subparagraph (A) or (B) of paragraph (2). The Inspector General is not required to make such an investigation if the information that the member believes evidences wrongdoing relates to actions which took place during combat."

Subsec. (c)(5). Pub. L. 103-337, Sec. 531(d)(1), redesignated subsec. (c)(5) as subsec. (e)(1).

Subsec. (c)(6), (7). Pub. L. 103-337, Sec. 531(d)(4), redesignated subsec. (c)(6) and (7) as subsec. (e)(3) and (4), respectively.

Subsec. (d). Pub. L. 103-337, Sec. 531(c)(2), added subsec. (d). Former subsec. (d) redesignated (f).

Subsec. (e). Pub. L. 103-337, Sec. 531(d)(1), redesignated subsec. (c)(5) as subsec. (e) and inserted subsec. heading and par. (1) designation before "Not later than 30 days". Former subsec. (e) redesignated (g).

Subsec. (e)(1). Pub. L. 103-337, Sec. 531(d)(2), substituted "subsection (c) or (d)" for "this subsection" and "the member of the armed forces who made the allegation investigated" for "the member of the armed forces concerned" and struck out at end "In the copy of the report submitted to the member, the Inspector General may exclude any information that would not otherwise be available to the member under section 552 of title 5." Subsec. (e)(2). Pub. L. 103-337, Sec. 531(d)(3), added par. (2).

Subsec. (e)(3). Pub. L. 103-337, Sec. 531(d)(4), (5), redesignated subsec. (c)(6) as subsec. (e)(3) and substituted "paragraph (1)" for "paragraph (5)".

Subsec. (e)(4). Pub. L. 103-337, Sec. 531(d)(4), redesignated subsec. (c)(7) as subsec. (e)(4).

Subsec. (f). Pub. L. 103-337, Sec. 531(c)(1), (f)(1), redesignated subsec. (d) as (f) and substituted "subsection

(e)(1)" for "subsection (c)(5)" in pars. (2)(A), (3)(A)(i) and (B). Former subsec. (f) redesignated (h).
Subsec. (g). Pub. L. 103-337, Sec. 531(c)(1), (f)(2), redesignated subsec. (e) as (g) and substituted "subsection (f)" for "subsection (d)". Former subsec. (g) redesignated (i).
Subsecs. (h), (i). Pub. L. 103-337, Sec. 531(c)(1), redesignated subsecs. (f) and (g) as (h) and (i), respectively. Former subsec. (h) redesignated (j).
Subsec. (j). Pub. L. 103-337, Sec. 531(c)(1), (e), redesignated subsec. (h) as (j) and added par. (3). 1989 - Subsec. (c)(1). Pub. L. 101-225, Sec. 202(1), inserted "when the Coast Guard is not operating as a service in the Navy" after "Coast Guard".
Subsec. (c)(5). Pub. L. 101-225, Sec. 202(2), inserted "(or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy)" after "Secretary of Defense".
Subsec. (c)(6). Pub. L. 101-225, Sec. 202(3), inserted "(or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy)" after "Secretary of Defense".
Subsec. (e). Pub. L. 101-225, Sec. 202(4), inserted "(except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy)" after "armed forces". 1988 - Pub. L. 100-456 substituted "Communicating with a Member of Congress or Inspector General; prohibition of retaliatory personnel actions" for "Communicating with a Member of Congress" in section catchline, and amended text generally. Prior to amendment, text read as follows: "No person may restrict any member of an armed force in communicating with a Member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." 1984 - Pub. L. 98-525 substituted "Member" for "member" in section catchline and text

EFFECTIVE DATE OF 1988 AMENDMENT

Section 846(d) of Pub. L. 100-456 provided that:
"The amendment to section 1034 of title 10, United

States Code, made by subsection (a)(1), shall apply with respect to any personnel action taken (or threatened to be taken) on or after the date of the enactment of this Act (Sept. 29, 1988) as a reprisal prohibited by subsection (b) of that section."

REGULATIONS

Section 531(h), (i) of Pub. L. 103-337 provided that: "(h) Deadline for Regulations. - The Secretary of Defense and the Secretary of Transportation shall prescribe regulations to implement the amendments made by this section (amending this section) not later than 120 days after the date of the enactment of this Act (Oct. 5, 1994). "(i) Content of Regulations. - In prescribing regulations under section 1034 of title 10, United States Code, as amended by this section, the Secretary of Defense and the Secretary of Transportation shall provide for appropriate procedural protections for the subject of any investigation carried out under the provisions of that section, including a process for appeal and review of investigative findings." Section 846(b) of Pub. L. 100-456 provided that: "The Secretary of Defense and the Secretary of Transportation shall prescribe the regulations required by subsection (g) (now (h)) of section 1034 of title 10, United States Code, as amended by subsection (a), not later than 180 days after the date of the enactment of this Act (Sept. 29, 1988)."

WHISTLEBLOWER PROTECTIONS FOR MEMBERS OF ARMED FORCES

Pub. L. 102-190, div. A, title VIII, Sec. 843, Dec. 5, 1991, 105 Stat. 1449, provided that: "(a) Regulations Required. - The Secretary of Defense shall prescribe regulations prohibiting members of the Armed Forces from taking or threatening to take any unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, as a reprisal against any member of the Armed Forces for making or preparing a lawful communication to any employee of the Department of Defense or any member of the Armed Forces who is assigned to or belongs to an organization which has as its primary

responsibility audit, inspection, investigation, or enforcement of any law or regulation. "(b) Violations by Persons Subject to the UCMJ. - The Secretary shall provide in the regulations that a violation of the prohibition by a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is punishable as a violation of section 892 of such title (article 92 of the Uniform Code of Military Justice). "(c) Deadline. - The regulations required by this section shall be prescribed not later than 180 days after the date of the enactment of this Act (Dec. 5, 1991).'

REPORT ON ACTIVITIES OF INSPECTOR GENERAL

Section 846(c) of Pub. L. 100-456 directed Inspector General of Department of Defense (and Inspector General of Department of Transportation with respect to Coast Guard) to submit, not later than Feb. 1, 1990, a report to Congress on activities of Inspector General under this section, with that report to include, in the case of each case handled by Inspector General under this section, a description of

(A) nature of allegation described in subsec. (c) of this section;

(B) evaluation and recommendation of Inspector General with respect to allegation;

(C) any action of appropriate board for correction of military records with respect to allegation;

(D) if allegation was determined to be meritorious, any corrective action taken; and

(E) views of member or former member of armed forces making allegation (determined on basis of interview under subsec. (f) of this section) on disposition of case

APPENDIX O

18 United States Code Chapter 19 § 372. Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force,

intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined under this title or imprisoned not more than six years, or both.

APPENDIX P

42 USC 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties
If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are
required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so
attended or testified, or to

influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner,
the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
(3) Depriving persons of rights or privileges If two or more persons in any State or Territory conspire or go
in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of
preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any
citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such
support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the
United States, the party so injured or deprived may
have an action for the recovery of damages

occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX Q

Geneva Convention relative to the Protection of Civilian Persons in Time of War

Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949

***entry into force* 21 October 1950**

PART I

GENERAL PROVISIONS

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases

where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: I to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

Article 7

In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

Article 8

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Article 9

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

Article 10

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the

consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

Article 11

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When persons protected by the present Convention do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State with which the State of which they are nationals has not normal diplomatic representation.

Article 12

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement. For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected person, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross who shall be invited to take part in such a meeting.

PART II

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

Article 13

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Article 14

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Article 15

Any Party to the conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

(a) Wounded and sick combatants or non-combatants;

(b) Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Article 16

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Article 17

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Article 18

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval

forces in order to obviate the possibility of any hostile action. In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Article 19

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Article 20

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be

entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.
The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

Article 21

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Article 22

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.
They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.
Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.
Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

Article 23

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital

stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) That the consignments may be diverted from their destination;

(b) That the control may not be effective; or

(c) That a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited there by being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Article 24

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in

all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.
The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.
They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

Article 25

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.
If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.
If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

Article 26

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular,

the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

PART III

STATUS AND TREATMENT OF PROTECTED PERSONS

SECTION I

PROVISIONS COMMON TO THE TERRITORIES OF THE PARTIES TO TEE CONFLICT AND TO OCCUPIED TERRITORIES

Article 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 28

The presence of a protected person may not be used to render certain points or areas immune from military operations.

Article 29

The Party to the conflict in whose hands protected persons

may be is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

Article 30

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

Article 31

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Article 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.

Article 33

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.
Pillage is prohibited.
Reprisals against protected persons and their property are prohibited.
Article 34

The taking of hostages is prohibited.
SECTION 11
ALIENS IN THE TERRITORY OF A PARTY TO THE CONFLICT
Article 35

All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.
If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.
Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

Article 36

Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned. The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

Article 37

Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty shall during their confinement be humanely treated.

As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

Article 38

With the exception of special measures authorized by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

1. They shall be enabled to receive the individual or collective relief that may be sent to them.
2. They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
3. They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.

4. If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
5. Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

Article 39

Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.
Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.
Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

Article 40

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.
If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.
In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers, in particular as

regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.
If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

Article 41

Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.
In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residences by virtue of a decision placing them in assigned residence elsewhere. the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

Article 42

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Article 43

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly,

give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Article 44

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

Article 45

Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct

the situation or shall request the return of the protected persons. Such request must be complied with.
In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.
The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Article 46

In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.
Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

SECTION 111

OCCUPIED TERRITORIES

Article 47

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Article 48

Protected persons who are not nationals of the Power whose territory is occupied may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article.

Article 49

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Article 50

The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any

case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

Article 51

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Article 52

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Article 53

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Article 54

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of

coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.
This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

Article 55

To the fullest extent of the means available to it the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.
The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.
The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Article 56

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.
In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

Article 57

The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.
The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

Article 58

The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.
The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

Article 59

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.
Such schemes, which may be undertaken either by States or by impartial humanitarian organizations

such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.
All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.
A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Article 60

Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

Article 61

The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.
Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

Article 62

Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

Article 63

Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

(a) Recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;

(b) The Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.

The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

Article 64

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective

administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Article 65

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Article 66

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Article 67

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence. They shall take into consideration the fact that the accused is not a national of the Occupying Power.

Article 68

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but

which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that, since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

Article 69

In all cases, the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment awarded.

Article 70

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Article 71

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

(a) Description of the accused;
(b) Place of residence or detention;
(c) Specification of the charge or charges (with mention of the penal provisions under which it is brought);
(d) Designation of the court which will hear the case;
(e) Place and date of the first hearing.

Article 72

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.

Article 73

A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

Article 74

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.

Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71, and in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgments other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment for two years or more, shall not run until notification of judgment has been received by the Protecting Power.

Article 75

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

Article 76

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.
They shall receive the medical attention required by their state of health.
They shall also have the right to receive any spiritual assistance which they may require.
Women shall be confined in separate quarters and shall be under the direct supervision of women.
Proper regard shall be paid to the special treatment due to minors.
Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.
Such persons shall have the right to receive at least one relief parcel monthly.

Article 77

Protected persons who have been accused of offences or convicted by the courts in occupied territory shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

Article 78

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance

with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

SECTION IV

REGULATIONS FOR THE TREATMENT OF INTERNEES

Chapter I

GENERAL PROVISIONS

Article 79

The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

Article 80

Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

Article 81

Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependants are without adequate means of support or are unable to earn a living.

Article 82

The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages.

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

Chapter II

PLACES OF INTERNMENT

Article 83

The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

Article 84

Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.

Article 85

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned , is in an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them.

Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

Article 86

The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.

Article 87

Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

Article 88

In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favour of the population shall also apply to them.

All due precautions must be taken in places of internment against the danger of fire.

Chapter III

FOOD AND CLOTHING

Article 89

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age shall be given additional food, in proportion to their physiological needs.

Article 90

When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

Chapter IV

HYGIENE AND MEDICAL ATTENTION

Article 91

Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as an appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

Article 92

Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of

each internee and, at least once a year, radioscopic examination.

Chapter V

RELIGIOUS, INTELLECTUAL AND PHYSICAL ACTIVITIES

Article 93

Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities.

Ministers of religion who are interned shall be allowed to minister freely to the members of their community. For this purpose, the Detaining Power shall ensure their equitable allocation amongst the various places of internment in which there are internees speaking the same language and be longing to the same religion. Should such ministers be too few in number, the Detaining Power shall provide them with the necessary facilities, including means of transport, for moving from one place to another, and they shall be authorized to visit any internees who are in hospital. Ministers of religion shall be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith. Such correspondence shall not be considered as forming a part of the quota mentioned in Article 107. It shall, however, be subject to the provisions of Article 112.

When internees do not have at their disposal the assistance of ministers of their faith, or should these latter be too few in number, the local religious authorities of the same faith may appoint, in agreement with the Detaining Power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter shall enjoy the facilities granted to the ministry he has assumed. Persons so appointed shall comply with all regulations laid

down by the Detaining Power in the interests of discipline and security.

Article 94

The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.

All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people.

Article 95

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

After a working period of six weeks, internees shall be free to give up work at any moment, subject to eight days' notice.

These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties connected with the protection of internees against aerial bombardment or other war risks. No

internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited.

The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for the said working conditions and for compensation shall be in accordance with the national laws and regulations, and with the existing practice; they shall in no case be inferior to those obtaining for work of the same nature in the same district. Wages for work done shall be determined on an equitable basis by special agreements between the internees, the Detaining Power, and, if the case arises, employers other than the Detaining Power, due regard being paid to the obligation of the Detaining Power to provide for free maintenance of internees and for the medical attention which their state of health may require. Internees permanently detailed for categories of work mentioned in the third paragraph of this Article shall be paid fair wages by the Detaining Power. The working conditions and the scale of compensation for occupational accidents and diseases to internees thus detailed shall not be inferior to those applicable to work of the same nature in the same district.

Article 96

All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.

Chapter VI

PERSONAL PROPER AND FINANCIAL RESOURCES
Article 97

Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.
The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.
Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.
On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.
Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.
Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

Article 98

All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons.

Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income on their property in accordance with the law of the Detaining Power. The amount of allowances granted by the Power to which they owe allegiance shall be the same for each category of internees (infirm, sick, pregnant women, etc.), but may not be allocated by that Power or distributed by the Detaining Power on the basis of discrimination between internees which are prohibited by Article 27 of the present Convention.

The Detaining Power shall open a regular account for every internee, to which shall be credited the allowances named in the present Article, the wages earned and the remittances received, together with such sums taken from him as may be available under the legislation in force in the territory in which he is interned. Internees shall be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and to other dependants. They may draw from their accounts the amounts necessary for their personal expenses, within the limits fixed by the Detaining Power. They shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts. A statement of accounts shall be furnished to the Protecting Power on request, and shall accompany the internee in case of transfer.

Chapter VII

ADMINISTRATION AND DISCIPLINE

Article 99

Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer in charge of the place of internment must have in his possession a copy of the present Convention in the official language, or one of the official languages, of his country and shall be responsible for its application. The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must likewise be given in a language which they understand.

Article 100

The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

Article 101

Internees shall have the right to present to the authorities in whose power they are any petition

with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers.

Article 102

In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. The members of the Committee shall be eligible for re-election.

Internees so elected shall enter upon their duties after their election has been approved by the detaining authorities. The reasons for any refusals or dismissals shall be communicated to the Protecting Powers concerned.

Article 103

The Internee Committees shall further the physical, spiritual and intellectual well-being of the internees.

In case the internees decide, in particular, to organize a system of mutual assistance amongst themselves, this organization would be within the competence of the Committees in addition to the special duties entrusted to them under other provisions of the present Convention.

Article 104

Members of Internee Committees shall not be required to perform any other work, if the accomplishment of their duties is rendered more difficult thereby.

Members of Internee Committees may appoint from amongst the internees such assistants as they may require. All material facilities shall be granted to them, particularly a certain freedom of movement necessary for the accomplishment of their duties (visits to labour detachments, receipt of supplies, etc.).

All facilities shall likewise be accorded to members of Internee Committees for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, and with the organizations which give assistance to internees. Committee members in labour detachments shall enjoy similar facilities for communication with their Internee Committee in the principal place of internment. Such communications shall not be limited, nor considered as forming a part of the quota mentioned in Article 107.

Members of Internee Committees who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

Chapter VIII

RELATIONS WITH THE EXTERIOR

Article 105

Immediately upon interning protected persons, the Detaining Power shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter. The Detaining Power shall likewise inform the Parties concerned of any subsequent modifications of such measures.

Article 106

As soon as he is interned, or at the latest not more than one week after his arrival in a place of

internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.

Article 107

Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly; these shall be drawn up so as to conform as closely as possible to the models annexed to the present Convention. If limitations must be placed on the correspondence addressed to internees, they may be ordered only by the Power to which such internees owe allegiance, possibly at the request of the Detaining Power. Such letters and cards must be conveyed with reasonable despatch; they may not be delayed or retained for disciplinary reasons.

Internees who have been a long time without news, or who find it impossible to receive news from their relatives, or to give them news by the ordinary postal route, as well as those who are at a considerable distance from their homes, shall be allowed to send telegrams, the charges being paid by them in the currency at their disposal. They shall likewise benefit by this provision in cases which are recognized to be urgent.

As a rule, internees' mail shall be written in their own language. The Parties to the conflict may authorize correspondence in other languages.

Article 108

Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical

supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

Article 109

In the absence of special agreements between Parties to the conflict regarding the conditions for the receipt and distribution of collective relief shipments, the regulations concerning collective relief which are annexed to the present Convention shall be applied.

The special agreements provided for above shall in no case restrict the right of Internee Committees to take possession of collective relief shipments intended for internees, to undertake their distribution and to dispose of them in the interests of the recipients.

Nor shall such agreements restrict the right of representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

Article 110

All relief shipments for internees shall be exempt from import, customs and other dues.

All matter sent by mail, including relief parcels sent by parcel post and remittances of money, addressed from other countries to internees or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 136 and the Central Information Agency provided for in Article 140, shall be exempt from all postal dues both in the countries of origin and destination and in intermediate countries. To this end. in particular, the exemption provided by the Universal Postal Convention of 1947 and by the agreements of the Universal Postal Union in favour of civilians of enemy nationality detained in camps or civilian prisons, shall be extended to the other interned persons protected by the present Convention. The countries not signatory to the above-mentioned agreements shall be bound to grant freedom from charges in the same circumstances.

The cost of transporting relief shipments which are intended for internees and which, by reason of their weight or any other cause, cannot be sent through the post office, shall be borne by the Detaining Power in all the territories under its control. Other Powers which are Parties to the present Convention shall bear the cost of transport in their respective territories.

Costs connected with the transport of such shipments, which are not covered by the above paragraphs, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the charges for telegrams sent by internees, or addressed to them.

Article 111

Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail and relief shipments provided for in Articles 106, 107, 108 and 113, the Protecting

Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake the conveyance of such shipments by suitable means (rail, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport, and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) Correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 140 and the National Bureaux referred to in Article 136;

(b) Correspondence and reports relating to internees which the Protecting Powers, the International Committee of the Red Cross or any other organization assisting the internees exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

The costs occasioned by the use of such means of transport shall be borne, in proportion to the importance of the shipments, by the Parties to the conflict whose nationals are benefited thereby.

Article 112

The censoring of correspondence addressed to internees or despatched by them shall be done as quickly as possible.

The examination of consignments intended for internees shall not be carried out under conditions that will expose the goods contained in them to deterioration. It shall be done in the presence of the addressee, or of a fellow-internee duly delegated by him. The delivery to internees of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by the Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

Article 113

The Detaining Powers shall provide all reasonable facilities for the transmission, through the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills. powers of attorney letters of authority, or any other documents intended for internees or despatched by them.

In all cases the Detaining Power shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

Article 114

The Detaining Power shall afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment and the law which is applicable. For this purpose, the said Power may give them permission to leave the place of internment in urgent cases and if circumstances allow.

Article 115

In all cases where an internee is a party to proceedings in any court, the Detaining Power shall, if he so requests, cause the court to be informed of his detention and shall, within legal limits, ensure that all necessary steps are taken to prevent him from being in any way prejudiced, by reason of his internment, as regards the preparation and conduct of his case or as regards the execution of any judgment of the court.

Article 116

Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

Chapter IX

PENAL AND DISCIPLINARY SANCTIONS

Article 117

Subject to the provisions of the present Chapter, the laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary punishments only.

No internee may be punished more than once for the same act, or on the same count.

Article 118

The courts or authorities shall in passing sentence take as far as possible into account the fact that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be obliged, to this end, to apply the minimum sentence prescribed.

Imprisonment in premises without daylight, and, in general, all forms of cruelty without exception are forbidden.

Internees who have served disciplinary or judicial sentences shall not be treated differently from other internees.

The duration of preventive detention undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.

Internee Committees shall be informed of all judicial proceedings instituted against internees whom they represent, and of their result.

Article 119

The disciplinary punishments applicable to internees shall be the following:

1. A fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days.
2. Discontinuance of privileges granted over and above the treatment provided for by the present Convention.
3. Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment.
4. Confinement.

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees. Account shall be taken of the internee's age, sex and state of health.

The duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.

Article 120

Internees who are recaptured after having escaped or when attempting to escape shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Article 118, paragraph 3, notwithstanding, internees punished as a result of escape or attempt to escape, may be subjected to special surveillance, on condition that such surveillance does not affect the state of their health, that it is exercised in a place of internment and that it

does not entail the abolition of any of the safeguards granted by the present Convention.

Internees who aid and abet an escape, or attempt to escape, shall be liable on this count to disciplinary punishment only.

Article 121

Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance in cases where an internee is prosecuted for offences committed during his escape.

The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.

Article 122

Acts which constitute offences against discipline shall be investigated immediately. This rule shall be applied, in particular, in cases of escape or attempt to escape. Recaptured internees shall be handed over to the competent authorities as soon as possible.

In case of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees, and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.

The provisions of Articles 124 and 125 shall apply to internees who are in confinement awaiting trial for offences against discipline.

Article 123

Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by

the commandant of the place of internment, or by a responsible officer or official who replaces him, or to whom he has delegated his disciplinary powers.

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.

The period elapsing between the time of award of a disciplinary punishment and its execution shall not exceed one month.

When an internee is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

A record of disciplinary punishments shall be maintained by the commandant of the place of internment and shall be open to inspection by representatives of the Protecting Power.

Article 124

Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements; they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

Article 125

Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily. They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money, however, may be withheld from them until the completion of their punishment; such consignments shall meanwhile be entrusted to the Internee Committee, who will hand over to the infirmary the perishable goods contained in the parcels.

No internee given a disciplinary punishment may be deprived of the benefit of the provisions of Articles 107 and 143 of the present Convention.

Article 126

The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.

Chapter X

TRANSFERS OF INTERNEES

Article 127

The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If, as an exceptional measure, such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in

quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.

Article 128

In the event of transfer, internees shall be officially advised of their departure and of their new postal address. Such notification shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee.

Mail and parcels addressed to their former place of internment shall be forwarded to them without delay.

The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees' community

property and of the luggage the internees are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph.

Chapter XI

DEATHS

Article 129

The wills of internees shall be received for safe-keeping by the responsible authorities; and in the event of the death of an internee his will shall be transmitted without delay to a person whom he has previously designated.

Deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.

An official record of the death, duly registered, shall be drawn up in accordance with the procedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency referred to in Article 140.

Article 130

The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be' cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom the deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves.

Article 131

Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official inquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Projecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.

Chapter XII

RELEASE, REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

Article 132

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Article 133

Internment shall cease as soon as possible after the close of hostilities.

Internees, in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

Article 134

The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

Article 135

The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of

his departure from its territory. The Detaining Power need not pay the costs of repatriation of an internee who was interned at his own request.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

SECTION V

INFORMATION BUREAUX AND CENTRAL AGENCY

Article 136

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, release, repatriations, escapes, admittances to hospitals, births and deaths.

Article 137

Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers of whom the aforesaid persons are nationals, or to Powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through

the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.
Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140.
All communications in writing made by any Bureau shall be authenticated by a signature or a seal.

Article 138

The information received by the national Bureau and transmitted by it shall be of such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.
Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.

Article 139

Each national Information Bureau shall, furthermore, be responsible for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by

statements giving clear and full identity particulars of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Detailed records shall be maintained of the receipt and despatch of all such valuables.

Article 140

A Central Information Agency for protected persons, in particular for internees, shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

Article 141

The national Information Bureaux and the Central Information Agency shall enjoy free postage for all mail, likewise the exemptions provided for in Article 110, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

PART IV

EXECUTION OF THE CONVENTION
SECTION I
GENERAL PROVISIONS
Article 142

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes , or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.
The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.
The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.
Article 143

Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.
They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

Article 144

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

Article 145

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another

High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of

hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 148

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Article 149

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION 11

FINAL PROVISIONS

Article 150

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

Article 151

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949.

Article 152

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.
A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Article 153

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.
Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

Article 154

In the relations between the Powers who are bound by The Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July, 1899, or that of 18 October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Article 155

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

Article 156

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.
The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the

Convention has been signed, or whose accession has been notified.

Article 157

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Article 158

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Article 159

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also

inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

ANNEX I

Draft agreement relating to hospital and safety zones and localities

Article 1

Hospital and safety zones shall be strictly reserved for the persons mentioned in Article 23 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August, 1949, and in Article 14 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August, 1949, and for the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Nevertheless, persons whose permanent residence is within such zones shall have the right to stay there.

Article 2

No persons residing, in whatever capacity, in a hospital and safety zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

Article 3

The Power establishing a hospital and safety zone shall take

all necessary measures to prohibit access to all persons who have no right of residence or entry therein.

Article 4

Hospital and safety zones shall fulfil the following conditions:

(a) They shall comprise only a small part of the territory governed by the Power which has established them.

(b) They shall be thinly populated in relation to the possibilities of accommodation.

(c) They shall be far removed and free from all military objectives, or large industrial or administrative establishments.

(d) They shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

Article 5

Hospital and safety zones shall be subject to the following obligations:

(a) The lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit.

(b) They shall in no case be defended by military means.

Article 6

Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.

Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground.

They may be similarly marked at night by means of appropriate illumination.

Article 7

The Powers shall communicate to all the High Contracting Parties in peacetime or on the outbreak

of hostilities, a list of the hospital and safety zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.
As soon as the adverse Party has received the above-mentioned notification, the zone shall be regularly established.
If, however, the adverse Party considers that the conditions of the present agreement have not been fulfilled, it may refuse to recognize the zone by giving immediate notice thereof to the Party responsible for the said zone, or may make its recognition of such zone dependent upon the institution of the control provided for in Article 8.

Article 8

Any Power having recognized one or several hospital and safety zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissions. for the purpose of ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.
For this purpose, members of the Special Commissions shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.

Article 9

Should the Special Commissions note any facts which they consider contrary to the stipulations of the present agreement, they shall at once draw the attention of the Power governing the said zone to these facts, and shall fix a time limit of five days within which the matter should be rectified. They shall duly notify the Power who has recognized the zone.
If, when the time limit has expired. the Power governing the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the present agreement in respect of the said zone.

Article 10

Any Power setting up one or more hospital and safety zones, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by the Protecting Powers or by other neutral Powers, persons eligible to be members of the Special Commissions mentioned in Articles 8 and 9.

Article 11

In no circumstances may hospital and safety zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.

Article 12

In the case of occupation of a territory, the hospital and safety zones therein shall continue to be respected and utilized as such.

Their purpose may, however, be modified by the Occupying Power, on condition that all measures are taken to ensure the safety of the persons accommodated.

Article 13

The present agreement shall also apply to localities which the Powers may utilize for the same purposes as hospital and safety zones.

ANNEX 11

Draft regulations concerning collective relief

Article I

The Internee Committees shall be allowed to distribute collective relief shipments for which they are responsible. to all internees who are dependent for administration on the said Committee's place of internment, including those internees who are in hospitals, or in prisons or other penitentiary establishments.

Article 2

The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the Internee

Committees. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

Article 3

Members of Internee Committees shall be allowed to go to the railway stations or other points of arrival of relief supplies near their places of internment so as to enable them to verify the quantity as well as the quality of the goods received and to make out detailed reports thereon for the donors.

Article 4

Internee Committees shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their places of internment has been carried out in accordance with their instructions.

Article 5

Internee Committees shall be allowed to complete, and to cause to be completed by members of the Internee Committees in labour detachments or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

Article 6

In order to secure the regular distribution of collective relief supplies to the internees in their place of internment, and to meet any needs that may arise through the arrival of fresh parties of internees, the Internee Committees shall be allowed to create and maintain sufficient reserve stocks of collective relief. For this purpose, they

shall have suitable warehouses at their disposal; each warehouse shall be provided with two locks, the Internee Committee holding the keys of one lock, and the commandant of the place of internment the keys of the other.

Article 7

The High Contracting Parties, and the Detaining Powers in particular, shall, so far as is in any way possible and subject to the regulations governing the food supply of the population, authorize purchases of goods to be made in their territories for the distribution of collective relief to the internees. They shall likewise facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

Article 8

The foregoing provisions shall not constitute an obstacle to the right of internees to receive collective relief before their arrival in a place of internment or in the course of their transfer, nor to the possibility of representatives of the Protecting Power, or of the International Committee of the Red Cross or any other humanitarian organization giving assistance to internees and responsible for forwarding such supplies, ensuring the distribution thereof to the recipients by any other means they may deem suitable.

APPENDIX R

Department of Defense
DIRECTIVE
NUMBER **5100.77**
December 9, 1998
GC, **DoD**
SUBJECT: **DoD** Law of War Program

References: (a) **DoD Directive 5100.77**, "**DoD** Law of War Program," July 10, 1979 (hereby canceled)
(b) **DoD** Directive 2310.1, "**DoD** Program for Enemy Prisoners of War (EPOW) and other Detainees (Short Title: **DoD** Enemy POW
Detainee Program)," August 18, 1994
(c) **DoD** Directive 5000.1, "Defense Acquisition," March 15, 1996
(d) Hague Convention No. IV, "Respecting the Laws and Customs of War on Land," October 18, 1907
(e) through (l), see enclosure 1

1. REISSUANCE AND PURPOSE

This **Directive**:

1.1. Reissues reference (a) to update policy and responsibilities in the Department of Defense for a program to ensure **DoD** compliance with the law of war obligations of the United States.

1.2. Expands the responsibilities of the Secretary of the Army as the **DoD** Executive Agent for the investigation and reporting of reportable incidents.

1.3. Establishes the **DoD** Law of War Working Group.

2. APPLICABILITY AND SCOPE

2.1. This **Directive** applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the
Defense Agencies, and the **DoD** Field Activities (hereafter referred to collectively as "the **DoD** Components").

2.2. In the implementation of this **Directive**, reference (b) addresses the **DoD** program for care and treatment of enemy prisoners of war (EPW), retained persons, and detainees. A reportable incident (as defined in paragraph 3.2., below) involving possible, suspected, or alleged violations of the protections afforded EPWs, retained persons, or detainees is included in the scope of this **Directive**.

2.3. In the further implementation of this **Directive**, that part of the law of war relating to legal reviews of the development, acquisition, and procurement of
weapons and weapon systems for the **DoD**

Components is addressed in **DoD Directive** 5000.1 (reference (c)) and in related guidance pertaining to Special Access Programs.

3. DEFINITIONS

3.1. Law of War. That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its

individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

3.2. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

4. POLICY

It is **DoD** policy to ensure that:

4.1. The law of war obligations of the United States are observed and enforced by the **DoD** Components.

4.2. An effective program to prevent violations of the law of war is implemented by the **DoD** Components.

4.3. All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

DODD 5100.77, December 9, 1998

4.4. All reportable incidents committed by or against allied persons, or by or against other persons during a conflict to which the United States is not a party, are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. On-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending turnover to U.S., allied, or other appropriate authorities.

5. RESPONSIBILITIES

5.1. The General Counsel of the Department of Defense shall:

5.1.1. Provide overall legal guidance in the Department of Defense on the Law of War Program, to include review of policies developed under or relating to the program, coordination of special legislative proposals, and other legal matters with other Federal Departments and Agencies, and resolution of disagreements on questions of law.

5.1.2. Establish a **DoD** Law of War Working Group consisting of

representatives from the General Counsel of the Department of Defense (GC, **DoD**), the Legal Counsel to the Chairman of the Joint Chiefs of Staff, the International and Operational Law Division of the Office of the Judge Advocate General of each Military Department, and the Operational Law Branch of the Office of the Staff Judge Advocate to the Commandant of the Marine Corps. The **DoD** Law of War Working Group shall develop and coordinate law of war initiatives and issues, manage other law of war matters as they arise, and provide advice to the General Counsel on legal matters covered by this **Directive**.

5.1.3. Coordinate and monitor the Military Departments' plans and policies for training and education in the law of war.

5.2. The Under Secretary of Defense for Policy shall:

5.2.1. Exercise primary staff responsibility for the **DoD** Law of War Program.

5.2.2. Ensure that the Assistant Secretary of Defense (International Security Affairs) shall provide overall development, coordination, approval, and promulgation of major **DoD** policies and plans, including final coordination of such proposed policies and plans with the **DoD** Components and other Federal Departments and Agencies as necessary, and final coordination of **DoD** positions on international negotiations on the law of war and U.S. signature or ratification of law of war treaties.

5.3. The Heads of the **DoD** Components shall:

5.3.1. Ensure that the members of their **DoD** Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

5.3.2. Institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination, as required by references (d) through (h).

5.3.3. Ensure that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs to comply with the reporting requirements established in section 6., below.

5.4. The Assistant Secretary of Defense for Public Affairs shall monitor the public affairs aspects of the **DoD** Law of War Program and provide public affairs guidance, as appropriate, to the **DoD** Components.

5.5. The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this **Directive** in support of the **DoD** Law of War Program to:

5.5.1. Provide directives, publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities. Ensure that programs are implemented in their respective Military Departments to prevent violations of the law of war, emphasizing any types of violations that have been reported under this **Directive**.

5.5.3. Provide for the prompt reporting and investigation of reportable incidents committed by or against members of their respective Military Departments, or persons accompanying them, in accordance with directives issued under subparagraph 5.8.4., below.

5.5.4. Where appropriate, provide for disposition, under the Uniform Code of Military Justice

(reference (i)), of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction.

5.5.5. Provide for the central collection of reports and investigations of reportable incidents alleged to have been committed by or against members of their respective Military Departments, or persons accompanying them.

5.5.6. Ensure that all reports of reportable incidents are forwarded to the Secretary of the Army in his or her capacity as the **DoD** Executive Agent under paragraph 5.6., below.

5.6. The Secretary of the Army, as the Executive Agent for the Secretary of Defense for reportable incidents, shall act for the Secretary of Defense in developing and coordinating plans and policies for, and in supervising the execution of, the

investigation of reportable incidents and, subject to **DoD** 8910.1-M (reference (j)), the collection, recording, and reporting of information concerning reportable incidents. This authority is separate from and subject to the responsibilities assigned the

Combatant Commanders in paragraphs 4.4., above, and 5.8., below, and the responsibilities assigned the Secretaries of the Military Departments in paragraph 5.5., above.

5.7. The Chairman of the Joint Chiefs of Staff shall:

5.7.1. Provide appropriate guidance to the Commanders of the Combatant Commands, consistent with 10 U.S.C. 163(a)(2) (reference (k)), conforming with the policies and procedures in this **Directive**. This guidance will include direction on the collection and investigation of reports of enemy violations of the law of war.

5.7.2. Designate a primary point of contact in his organization to administer activities under this **Directive**.

5.7.3. Issue and review appropriate plans, policies, directives, and rules of engagement, as necessary, ensuring their consistency with the law of war obligations of the United States.

5.7.4. Ensure that plans, policies, directives, and rules of engagement issued by the Commanders of

the Combatant Commands are consistent with this **Directive** and the law of war.

5.8. The Commanders of the Combatant Commands shall:

5.8.1. Institute effective programs within their respective commands to prevent violations of the law of war and ensure that their commands' plans, policies, directives, and rules of engagement are subject to periodic review and evaluation, particularly in light of any violations reported.

5.8.2. Implement guidance from the Chairman of the Joint Chiefs of Staff for the collection and investigation of reports of enemy violations of the law of war.

5.8.3. Designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war.

5.8.4. Issue directives to ensure that reportable incidents involving U.S. or enemy persons are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities.

5.8.5. Determine the extent and manner in which a reportable incident not involving U.S. or enemy persons will be investigated by U.S. Forces and ensure that such incidents are reported promptly to appropriate U.S. Agencies, allied governments, or
other appropriate authorities.

5.8.6. Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this **Directive** and the law of war.

5.8.7. Ensure that law of war training and dissemination programs of subordinate commands and components are consistent with this **Directive** and the law of war obligations of the United States.

5.9. The Assistant Secretary of Defense for Command, Control, Communications, and

Intelligence shall ensure that the Director, Defense Intelligence Agency, shall provide information from the intelligence community to the Secretary of the Army and to the Commanders of the Combatant Commands, consistent with their respective obligations under paragraphs 5.6. and 5.8., above, concerning reportable incidents perpetrated against captured or detained U.S. persons, or committed by or against U.S. allies, or committed by or against other persons during a conflict to which the United States is not a party.

6. INFORMATION REQUIREMENTS

6.1. Reports of Incidents. All military and civilian personnel assigned to or accompanying a **DoD** Component shall report reportable incidents through their chain of command. Such reports also may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. Reports that are made to officials other than those specified in this paragraph shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.

6.2. Initial Report. The commander of any unit that obtains information about a reportable incident shall immediately report the incident through command channels to higher authority. The initial report shall be made through the most expeditious means available.

6.3. Higher authorities receiving an initial report shall:

6.3.1. Request a formal investigation by the cognizant military investigation authority.

6.3.2. Submit a report of any reportable incident, by the most expeditious means available, through command channels, to the responsible Combatant Commander. Normally, an OPREP-3 report, established in Joint Pub 1-03.6, Joint Reporting System, Event/Incident Reports (E/IR), will be required. Copies of the E/IR shall be provided to the **DoD** Component officials designated by the Heads of the **DoD** Components concerned.

6.3.3. Submit a report, in accordance with **DoD** Instruction 5240.4 (reference (l)), concerning any criminal case, regardless of the allegation, that has received, is expected to receive, or which, if disclosed, could reasonably be expected to receive,
significant media interest.
6.4. The Combatant Commander shall report, by the most expeditious means available, all reportable incidents to the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the Secretary of the Army in his role as the Executive Agent under paragraph 5.6., above.
6.5. **DoD** Notifications. Notifications of a reportable incident shall be forwarded to the Chairman of the Joint Chiefs of Staff; the GC, **DoD**; the Assistant Secretary of Defense for Public Affairs; and the Inspector General of the Department of Defense, who will inform their counterparts in any Military Service or Department concerned.
6.6. Information Requirements. The Event/Incident Reports referred to in this **Directive** and further described in reference (l) are exempt from licensing in accordance with subparagraph 5.4.2. of **DoD** 8910.1-M (reference (j)).
7. EFFECTIVE DATE AND IMPLEMENTATION
This **Directive** is effective immediately. Forward two copies of implementing documents to the General Counsel of the Department of Defense and the Under Secretary of Defense for Policy within 120 days.

E1. ENCLOSURE 1
REFERENCES, continued
(e) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949
(f) Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949
(g) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949

(h) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
(i) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"
(j) **DoD** 8910.1-M. "**DoD** Procedures for Management of Information Requirements," June 1998
(k) Section 163(a)(2) of title 10, United States Code
(l) **DoD** Instruction 5240.4, "Reporting of Counterintelligence and Criminal Violations," September 22, 1992

APPENDIX S

D IG, DoD
NOV 20, 1989
DoD Dir. 7050.6

SUBJECT: Military Whistleblower Protection

References: (a) Public Law 100-456, "National Defense Authorization Act of 1989," Section 846, September 29, 1988 (Title 10, United States Code, Section 1034)
(b) DoD Directive 5400.7, "DoD Freedom of Information Act Program," May 13, 1988
(c) Title 10, United States Code, Sections 1552 and 1553
(d) Public Law 95-452, "Inspector General Act of 1978" October 12, 1978 (as amended)
(e) DoD Directive 7050.1, "Defense Hotline Program," March 20,

PURPOSE

This Directive:

1. Establishes policy and implements reference (a) to provide protection against reprisal for military members of the Armed Forces for making a lawful communication to a Member of Congress or an Inspector General (IG) in which the military member makes a complaint or discloses information that he or she reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety.

2. Assigns responsibilities and delegates authorities for such protection and prescribes operating procedures (enclosure 2).

APPLICABILITY

This Directive applies to all DoD personnel and to the Office of the Secretary of Defense (OSD), the Military Departments (including their National Guard and Reserve components), the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD) and the Defense Agencies, including nonappropriated fund activities (hereafter referred collectively as "DoD Components").

DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

POLICY

It is DoD policy that::

1. No person shall restrict a member of the Armed Forces from lawfully communicating with a Member of Congress or an IG.

2. Members of the Armed Forces shall be free from reprisal for making or preparing to make lawful communications to members of Congress and IGs.

3. Any employee or member of the Armed Forces who has the authority to direct others to take, or recommend or approve any personnel action shall, under such authority, take, withhold, threaten to take, or threaten to hold a personnel action regarding any member of the Armed 'Forces in reprisal to making or preparing to make a lawful communication to a Member of Congress or IG.

RESPONSIBILITIES

I. The Inspector General, Department of Defense (IG, DoD), shall:

a. Expeditiously initiate an investigation or any allegation submitted to the

IG., DoD, under this Directive by a member of the Armed forces that a personnel action has been taken (or threatened) in reprisal for making or preparing to make a lawful communication to a Member of Congress or an IG in which the military member makes a complaint or discloses information that the military member reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial specific danger to public health or safety. The IG, DoD, may request the appropriate DoD Component IG to conduct the investigation. No investigation is required when such allegation is submitted more than 60 days after the military member became aware of the personnel action that is the subject of the allegation.

b. Initiate a separate investigation of the information the military member believes evidences wrongdoing if such investigation has not already been initiated. No investigation is required if the information that the military member believes evidences wrongdoing relates to actions that took pace during combat.

c. Complete the investigation of the allegation of reprisal and issue a report within 90 days of the receipt of the allegation. If a determination is made that the report cannot be issued within 90 days of receipt of the allegation, notify the Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P) and the military member or former military member making the allegation of the reasons why the report will not be submitted within that time and when the report will be submitted.

d. Prepare a report of the results of the investigation. The report will include a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation and copies of interviews conducted.

e. Submit a copy of the investigation report to the ASD(FM&P) and the

military member or former military member making the allegation not more than 30 days after the completion of the investigation. The copy of the report issued to the military member may exclude any information not otherwise available to him and/or her under DoD Directive 5400.7 (reference (b)).

f. At the request of a Board for the Correction of Military Records (BCMR), submit a copy of the investigative report to the Board.

g. At the request of a BCMR, gather further evidence and issue a further report to the Board.

h. After the final action in any allegation filed under this Directive, whenever possible, interview the person who made the allegation to determine the views of that person on the disposition of the matter.

i. Review and determine the adequacy of any DoD Component IG investigation of allegations of reprisal for making or preparing to make a lawful communication to a Member of Congress or an IG conducted under P.L. 100-456 (reference (a)) and at the request of the IG, DoD. If such inquiry is found inadequate, start an investigation to correct the inadequacies or ensure that the DoD Component corrects the inadequacies.

2. The Inspectors General (IGs) of DoD Components shall:

a. Upon receipt of a military member's allegation of reprisal for making or preparing to make a lawful communication to a Member of Congress or an IG, expeditiously investigate the allegation and notify the IG, DoD of the initiation and the expected date of completion of such investigation. No investigation is required when such allegation is submitted more than 60 days after the military member became aware of the personnel action that is the subject of the allegation.

b. Upon completion of an investigation into an allegation that a military member or former military member suffered reprisal, forward a copy of the investigative report to the Head of the DoD Component and the military member. The copy of the report issued to the military member may exclude any information not otherwise available to him and/or her under DoD Directive 5400.7 (reference (b)).

c. For those investigations done at the request of the IG, DoD, within 90 days of the receipt of the allegation, provide the IG, DoD, with an investigative report containing a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted.

d. At the request of a BCMR, submit a copy of the investigative request to the Board.

2. The Inspectors General (IGs) of DoD Components shall:

a. Upon receipt of a military member's allegation of reprisal for making or preparing to make a lawful communication to a Member of Congress or an IG, expeditiously investigate the allegation and notify the IG, DoD of the initiation and the expected date of completion of such investigation. No investigation is required when such allegation is submitted more than 60 days after the military member became aware of the personnel action that is the subject of the allegation.

b. Upon completion of an investigation into an allegation that a military member or former military member suffered reprisal, forward a copy of the investigative report to the Head of the DoD Component and the military member. The copy of the report issued to the military member may exclude any information not otherwise available to him and/or her under DoD Directive 5400.7 (reference (b)).

c. For those investigations done at the request of the IG, DoD, within 90 days of

the receipt of the allegation, provide the IG, DoD, with an investigative report containing a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted.

d. At the request of a BCMR, submit a copy of the investigative request to the Board.

e. At the request of a BCMR, gather further evidence and issue a further report to the Board.

3. The Boards for the Correction of Military Records (BCMRs) shall:

a. Determine whether to resolve an application for the correction of records made by a member or former member of the Armed Forces who has filed a timely complaint with the IG, DoD, alleging a personnel action was taken in reprisal for making or preparing to make a lawful communication to a Member of Congress or an IG, in accordance with 10 U.S.C. 1552 (reference (c)). This may include the receipt of oral argument, examining and cross-examining witnesses, taking dispositions, and conducting an evidentiary hearing at the board's discretion.

b. Review the report of any investigation into the military member's allegation of reprisal conducted by the IG, DoD, or the IG of a DoD Component.

c. As deemed necessary, request that the IG, DoD, or the IG of the DoD Component originally investigating the allegation further evidence.

d. If the Board elects to hold an administrative hearing the military member may be represented by a judge advocate (JA) if:

(1) The IG, DoD, report of investigation finds that there is probable cause to believe that a personnel action was taken, withheld, or threatened in reprisal for the military member making or preparing to make a lawful

communication to a Member of Congress or an IG.

(2) The Judge Advocate General concerned determines that the case is unusually complex or otherwise requires JA assistance to ensure proper presentation of the legal issues in the case.

(3) The military member is not represented by outside counsel chosen by the military member.

e. If the Board elects to hold an administrative hearing, ensure that the military member may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence in an IG investigatory record, but not included in the report released to the member.

f. If the Board determines that a personnel action was taken in reprisal for a military member or former military member making or preparing to make a lawful communication to a Member of Congress or an IG, the Board may forward its recommendation to the Secretary concerned for appropriate administrative or disciplinary action against the individual or individuals who committed the action.

4. The Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P)) shall:

a. Review and process, under the standards and procedures in section 5. of enclosure 2 of this Directive, requests from members or former members of the Armed Forces for review of final decisions of a Secretary of a Military Department on applications for correction of military records decided under this Directive.

b. for a military member or former military member making or preparing to make a lawful communication to a Member of Congress or an IG, the Board may forward its recommendation to the Secretary concerned for

appropriate administrative or disciplinary action against the individual or individuals who committed the action.

4. The Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P)) shall:

a. Review and process, under the standards and procedures in section 5. of enclosure 2 of this Directive, requests from members or former members of the Armed Forces for review of final decisions of a Secretary of a Military Department on applications for correction of military records decided under this Directive.

b. Notify the IG, DoD, of decisions made on requests for review of a final decision of a Secretary of a Military Department on an application of correction of military records submitted under this Directive.

5. The Secretaries of Military Departments, or their designees, under 10 U.S.C. 1552 (reference (c)). shall:

a. Within 180 days of its receipt, issue a final decision on an application for the correction of military records from a military member or former military member alleging reprisal for making or preparing to make a lawful communication to Members of Congress or an IG. When the final decision does not grant the full relief by the military member, advise the member that within 90 days he and/or she may request the Secretary of Defense to reconsider the action.

b. When reprisal is found, take appropriate corrective action, including the correction of the records of the military member in accordance with 10 U.S.C. 1552 and 1553 (reference (c)).

c. Ensure that administrative or disciplinary action, if appropriate, is taken against individuals found to have taken reprisal against a military member or making or preparing to make a communication to a Member of Congress or an IG.

d. Notify the IG, DoD, of a decision on an application for the correction of

military records received from a military member or former military member alleging reprisal for making or preparing to make a lawful communication to a Member of Congress or an IG, and of any disciplinary action taken.

6. The DoD Components shall:

a. Based on an IG investigative report, take appropriate corrective action.

b. Publicize the content of this Directive to ensure that military and other DoD personnel fully understand the scope and application of the Directive. The publicity should include the definition of "communication" (definition 2. of enclosure 1) and the procedures for filing a complaint (enclosure 2).

F. AUTHORITY

1. The Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P)) is hereby delegated authority to:

a. Have access to all research, reports, investigations, audits, reviews, documents, papers, or any other material necessary to carry out the responsibilities of subsection E.4., above.

b. Request the Secretaries of the Military Departments to comment on and make available for review, if necessary, evidence considered by a BCMR in cases in which the Secretary is requested to reconsider the final decision of the Secretary concerned.

c. Issue instructions to amplify or amend the procedures in section 5 of enclosure 2 of this Directive, as may be necessary, to implement the responsibilities of subsection E.4., above.

2. The Secretary of Defense shall, upon receipt of a timely request from a military member or former military member in accordance with the Operating Procedures annexed to this Directive, make a decision to uphold or reverse the decision of a Secretary of a Military Department in an application for the correction of military records alleging reprisal

for making or preparing to make a communication to a Member of Congress or an IG.

G. EFFECTIVE DATE

This Directive is effective immediately.

Donald J. Atwood
Deputy Secretary of Defense

Enclosures - 2
1. Definitions
2. Operating Procedures

APPENDIX T

***Army Regulation 15-185**
Effective 29 March 2000
Boards, Commissions, and Committees
*This regulation supersedes Army Regulation 15-185, dated 18 May 1977.

Chapter 1 1-1. Purpose
This regulation prescribes the policies and procedures for correction of military recordsby the Secretary of the Army, acting through the Army Board for Correction of MilitaryRecords (ABCMR).

1-2. References
Appendix A lists required and related publications and prescribed and referenced forms.

1-3. Explanation of abbreviations and terms
The glossary defines abbreviations and special terms.

1-4. Statutory authority

Section 1552 of title 10 of the U.S. Code (Correction of Military Records: Claims Incident Thereto) (10 U.S.C. 1552) is the statutory authority for this regulation.

Section II Responsibilities

1-5. The Secretary of the Army

The Secretary of the Army will oversee the operations of the ABCMR. The Secretary will take final action on applications, as appropriate.

1-6. The ABCMR Director

The ABCMR Director will manage the ABCMR's day-to-day operations.

1-7. The chair of an ABCMR panel

The chair of a given ABCMR panel will preside over the panel, conduct a hearing, maintain order, ensure the applicant receives a full and fair opportunity to be heard, and certify the written record of proceedings in pro forma and formal hearings as being true and correct.

1-8. The ABCMR members

The ABCMR members will—

a. Review all applications that are properly before them to determine the existence of error or injustice.

b. If persuaded that material error or injustice exists and that sufficient evidence exists on the record, direct or recommend changes in military records to correct the error or injustice.

c. Recommend a hearing when appropriate in the interest of justice.

d. Deny applications when the alleged error or injustice is not adequately supported by the evidence and when a hearing is not deemed proper.

e. Deny applications when the application is not filed within prescribed time limits and when it is not in the interest of justice to excuse the failure to file in a timely manner.

1-9. The director of an Army records holding agency

The director of an Army records holding agency will—

a. Take appropriate action on routine issues that may be administratively corrected under authority inherent in the custodian of the records and that do not require ABCMR action.

b. Furnish all requested Army military records to the ABCMR.

c. Request additional information from the applicant, if needed, to assist the ABCMR in conducting a full and fair review of the matter.

d. Take corrective action directed by the ABCMR or the Secretary of the Army.

e. Inform the Defense Finance and Accounting Service (DFAS), when appropriate; the applicant; applicant's counsel, if any; and interested Members of Congress, if any, after a correction is complete.

f. Return original records of the soldier or former soldier obtained from the Department of Veterans Affairs (VA).

1-10. The commanders of Army Staff agencies and commands

The commanders of Army Staff agencies and commands will—

a. Furnish advisory opinions on matters within their areas of expertise upon request of the ABCMR, in a timely manner.

b. Obtain additional information or documentation as needed before providing the opinions to the ABCMR.

c. Provide records, investigations, information, and documentation upon request of the ABCMR.

d. Provide additional assistance upon request of the ABCMR.

e. Take corrective action directed by the ABCMR or the Secretary of the Army.

1-11. The Director, Defense Finance and Accounting Service

At the request of the ABCMR staff, the Director, DFAS, will—

a. Furnish advisory opinions on matters within the DFAS area of expertise upon request.

b. Obtain additional information or documentation as needed before providing the opinions.

c. Provide financial records upon request.

d. On behalf of the Army, settle claims that are based on ABCMR final actions.

e. Report quarterly to the ABCMR Director on the monies expended as a result of
ABCMR action and the names of the payees.

Chapter 2 General Section I

ABCMR Establishment and Functions

2-1. ABCMR establishment

The ABCMR operates pursuant to law (10 U.S.C. 1552) within the Office of the Secretary of the Army. The ABCMR consists of civilians regularly employed in the executive part of the Department of the Army (DA) who are appointed by the Secretary of the Army and serve on the ABCMR as an additional duty. Three members constitute a quorum.

2-2. ABCMR functions

a. The ABCMR considers individual applications that are properly brought before it. In appropriate cases, it directs or recommends correction of military records to remove an error or injustice.

b. When an applicant has suffered reprisal under the Military Whistleblower Protection Act (section 1034, title 10, of the U.S. Code (10 U.S.C. 1034) and Department of Defense Directive (DODD) 7050.6), the ABCMR may recommend to the Secretary of the Army that disciplinary or administrative action be taken against any Army official who committed an act of reprisal against the applicant.

c. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an

evidentiary hearing or an administrative hearing in 10 U.S.C. 1034 and DODD 7050.6) or request additional evidence or opinions.

APPENDIX U
CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

J-3 CJCSI 5810.01B
DISTRIBUTION: A, B, C, J, S 25 March 2002
Directive current as of 28 March 2005

IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM

References:

a. DOD Directive 5100.77, 9 December 1998, "DoD Law of War Program"

b. DOD Directive 5100.1, 25 September 1987, "Functions of the Department of Defense and its Major Components"

c. CJCS Manual 3150.03, 19 June 1998, "Joint Reporting Structure Event and Incident Reports"

1. Purpose. Pursuant to the authorities delegated in references a and b, this instruction establishes joint policy, assigns responsibilities, and provides guidance regarding the law of war obligations of the United States. Reference a provides policy guidance and assigns responsibility within the Department of Defense for a program to ensure compliance with the law of war. Reference b assigns the Chairman of the Joint Chiefs of Staff the responsibility to develop and establish military doctrine and guidance for all aspects of joint employment and activities of the Armed Forces. This instruction implements the requirements of reference a to provide common policy for coordinated actions by the Military Services and combatant commands.

2. Cancellation. CJSCI 5810.01A, 27 August 1999, is canceled.

3. Applicability. This instruction applies to all personnel of the Armed Forces, including civilians, regardless of assignment or attachment.

4. Policy

a. The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations. Specifically, reference a provides that it is the policy of the Department of Defense to ensure that:

(1) The law of war obligations of the US Government are observed and enforced by the US Armed Forces.

(2) An effective program designed to prevent violations of the law of war is implemented by the US Armed Forces.

(3) All reportable incidents committed by or against members of (or persons serving with or accompanying) the US Armed Forces are promptly reported, thoroughly investigated and, where appropriate, remedied by corrective action.

(4) All known reportable incidents committed by or against allied military or civilian personnel, or by or against other persons during a conflict to which the United States is not a party, are reported through appropriate command channels for ultimate transmission to appropriate US agencies, allied governments, or other appropriate authorities. See subparagraph 3f(4) of Enclosure A. A preliminary inquiry will be conducted to confirm that no US personnel are involved in the reportable incident.

b. At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisers will provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.

5. Definitions

a. Law of War. International law that regulates the conduct of armed hostilities; often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities, which is binding on the United States or its individual citizens. It includes treaties and international agreements to which the United States is a party, as well as applicable customary international law.

b. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

6. Responsibilities. See Enclosure A.

7. Reporting Requirements

a. Reports of Incidents. Commanders of combatant commands will issue directives to ensure that all military and civilian personnel assigned to or accompanying US Armed Forces will convey all reportable incidents through their chain of command. The directives will indicate that such reports may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. The directives will require that reports made to officials other than those specified in this paragraph will be accepted and immediately forwarded through the recipient's chain of command.

b. Initial Report. Law of war implementing directives issued by combatant commanders will require the commander of any unit that obtains information about a reportable incident to immediately report the incident through command channels to a higher authority. The report will be made through the most expeditious means available.

c. Investigation. Commanders of combatant commands will establish procedures for receiving initial reports of reportable incidents, and will ensure that their subordinate commanders:

(1) Submit a report, by the most expeditious means available, through command channels to the responsible combatant commander. Normally, an OPREP-3 report will be required in accordance with reference c.

(2) Initiate an investigation by an appropriate military investigative authority in accordance with subparagraphs 3f(2) and 3f(4) of Enclosure A.

d. The responsible combatant commander will submit a message report, as expeditiously as possible, for all reportable incidents to the Joint Staff (JOINT STAFF WASHINGTON DC//DJS/J-1/J-2/J-3/ J-5/LC/PA//), The Office of the Secretary of Defense (SECDEF WASHINGTON DC//USDP/ISA/GC/IG/PA//), and the Secretary of the Army (DA WASHINGTON DC//SAGC/SAIG/DAMO-ZA/DAJA//), in the Secretary's capacity as Executive Agent under paragraph 5.6 of reference a.

8. Summary of Changes. This instruction revises CJCSI 5810.01A and provides updated guidance in accordance with reference a.

9. Releasability. This instruction is approved for public release; distribution is unlimited. DOD components (to include the combatant commands), other federal agencies, and the public may obtain copies of this instruction through the Internet from the CJCS Directives Home

Page -- http://www.dtic.mil/doctrine. Copies are also available through the Government Printing Office or the Joint Electronic Library CD-ROM.

10. Effective Date. This instruction is effective immediately. Forward copies of implementing directives or supplements and revisions to the Joint Staff J-5 United Nations and Multilateral Affairs Division, Room 2E1001, Pentagon, Washington, D.C. 20318-5154, within 120 days of receipt of this instruction. The Chief, J-5 United Nations and Multilateral Affairs Division, will forward copies of such documents to the Office of the Secretary of Defense in accordance with reference a.

For the Chairman of the Joint Chiefs of Staff:

JOHN P. ABIZAID

Lieutenant General, USA

Director, Joint Staff

Enclosure:

A--Responsibilities

A286

4 CJCSI 5810.01B 25 March 2002
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Naval Post Graduate School	1
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ENCLOSURE A
RESPONSIBILITIES

1. The Director, Joint Staff (DJS), will:

a. Ensure the Joint Staff acts on policy, politico-military, and other issues involved in the execution of the DOD Law of War Program and provides necessary liaison with the Office of the Secretary of Defense, Department of State, Services, and combatant commands.

b. Ensure Joint Staff directorates provide policy and operational guidance within their respective functional areas as noted below:

(1) The Director for Manpower and Personnel (J-1) will ensure that a copy of all investigations of reportable incidents submitted by the combatant commanders, in accordance with subparagraphs 3f(2) through 3f(4), is forwarded to appropriate Joint Staff principals (DJS/J-2/J-3/J-5/LC/PA).

(2) The Director for Intelligence (J-2) will establish priority intelligence requirements (PIR) for all law of war violations alleged to have been committed against captured or detained

US persons, committed by or against US allies, or committed by or against other persons during a conflict to which the United States is not a party. The PIR will be listed as part of Appendix 1 to Annex B (Intelligence) to all operation plans.

(3) The Director for Operations (J-3) will, in coordination with the Legal Counsel to the Chairman:

(a) Ensure the Joint Operations Planning and Execution System includes appropriate guidance to ensure review of plans and rules of engagement for compliance with the law of war.

(b) Review all requests from the combatant commanders for deployment orders and rules of engagement to ensure conformity with this instruction and the DOD Law of War Program, as well as domestic and international law.

(4) The Director for Strategic Plans and Policy (J-5) will:

(a) Serve as the Joint Staff principal point of contact for the DOD Law of War Program and, in coordination with the Legal Counsel to the Chairman, provide necessary liaison for developing policy within the context of the DOD Law of War Program.

(b) Ensure the Joint Strategic Capabilities Plan includes appropriate guidance to ensure compliance with the law of war.

(5) The Director for Operational Plans and Joint Force Development (J-7) will, in coordination with the Legal Counsel to the Chairman:

(a) Review operation plans and strategic concepts issued by commanders of combatant commands to ensure conformance with domestic and international law, this instruction, and the DOD Law of War Program.

(b) Ensure that operational exercises include law of war scenarios to improve evaluation, response, and reporting procedures.

(6) The Legal Counsel (LC) to the Chairman will:

(a) Provide overall legal guidance to the Chairman of the

Joint Chiefs of Staff on the DOD Law of War Program.
(b) Review all plans, policies, directives, deployment orders, execute orders, and rules of engagement issued by the Joint Staff and/or submitted by combatant commanders to ensure their conformance with domestic and international law, this instruction, and the law of war.
(c) Provide a representative to the DOD Law of War working group established by the DOD General Counsel pursuant to reference a.
2. The combat support agencies will establish and periodically review agency-unique policies, directives, and training programs consistent with this instruction and the DOD Law of War Program to ensure the requirements of the law of war are disseminated throughout their respective organizations.
3. The commanders of combatant commands are responsible for the overall execution of the DOD Law of War Program within their respective commands. Specific responsibilities include ensuring:
a. An effective program is instituted within the command to prevent law of war violations.
b. All plans, policies, directives, and training programs are periodically reviewed for compliance with the law of war, particularly in light of any violations reported.

c. Specific law of war scenarios are included in exercises to improve evaluation, response, and reporting procedures.
d. Command legal advisers attend planning and operations-related conferences for military operations and exercises, as appropriate, to enable them to provide advice concerning law of war compliance during joint and combined operations.
e. All operation plans (including preplanned and adaptively planned strategic targets), concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are reviewed by the command legal adviser to ensure compliance with domestic and international law, this instruction, and the DOD Law of War Program.

f. All appropriate policies, directives, and operation and concept plans incorporate the reporting and investigation requirements established by reference a and this instruction, and by the Secretary of the Army, who is designated by reference a as the DOD Executive Agent for the administration of the DOD Law of War Program with respect to investigating and reporting reportable incidents. Specifically, commanders of combatant commands will:

(1) Designate the command legal adviser to supervise the administration of the command's program for dealing with reportable incidents.

(2) Ensure, via appropriate command directives, that all reportable incidents committed by or against members of (or persons serving with or accompanying) US Armed Forces are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities. Applicable directives will include specific guidance on the collection and preservation of evidence of reportable incidents committed by enemy forces against US personnel since such evidence may serve as the basis for a possible future trial of accused war criminals. See subparagraph 3f(4) below for guidance when collecting and preserving evidence of reportable incidents in which it is determined that US personnel are not involved.

(3) Provide the Joint Staff J-1 with copies of all incident reports and reports of investigation of reportable incidents committed by or against members of (or persons accompanying or serving with) US Armed Forces or against their property. J-1 will ensure such reports are provided to appropriate Joint Staff principals (DJS/J-2/J-3/J-5/LC/PA).

(4) Determine, with respect to known reportable incidents committed by or against allied military or civilian personnel or by or against other persons during a conflict of which the United States is not a party, the extent and manner in which such incidents will be investigated by US forces. Specifically, combatant commanders will develop

appropriate plans, policies, and directives for:

(a) Conducting appropriate preliminary inquiry to determine US personnel involvement. Upon determination that US personnel are not involved in a reportable incident, further US investigation will be conducted only at the direction of the appropriate combatant commander.

(b) Cooperating with appropriate allied authorities.

(c) Reporting through appropriate command channels to appropriate US agencies, allied governments, or other appropriate authorities.

(d) Preserving evidence of reportable incidents pending turnover to other US agencies, allied governments, or other appropriate authorities.

g. Mobilization planning includes sufficient numbers of legal advisers and investigative personnel to support each commander's mission.

h. The law of war training and dissemination programs within their commands, as well as the law of war training and dissemination programs of their subordinate commands and components, are consistent with reference a, this instruction, and the law of war obligations of the United States.

APPENDIX V

United Nations and the Geneva Conventions
by Roy Gutman

In November 1994, as hundreds of Bosnian and Krajina Serb troops advanced on the UN-declared "safe area" of Bihac, disaster loomed for the municipal hospital, which stood directly in the path of the offensive, and for the nine hundred immobile patients inside. The Canadian commander of UN forces in Bihac was reluctant to intervene. The UN force's civil affairs representative, an American, argued that hospitals have a "sacred" status under the 1949 Geneva Conventions and the UN Protection Force (UNPROFOR) had an obligation to protect this one.

He drafted a memo to this effect, and his superior in Sarajevo, a Russian, issued a formal request. "The Geneva conventions stipulate that hospitals shall not be attacked . . . the support and concurrence of UNPROFOR military will also be needed. Please immediately pursue the plan with the Bihac commanding officer," it said. Acting on the memo, the commander instructed Bangladeshi troops to drive their armored personnel carriers onto the hospital grounds. The Serbs refrained from attacking the hospital, and the ground invasion was halted. Bihac, a town of seventy thousand, was saved.

Two weeks later, the UN's Office of Legal Affairs (OLA), weighed in to ensure that the saving of Bihac did not set a precedent. UN forces, an OLA representative said, are bound only by their Security Council mandate and are not legally obliged to uphold the conventions. "From a strictly legal point of view, obligations (such as the Geneva Conventions) are binding on States. The role of the UN is to carry out the will of the international community as expressed by it in the

Security Council," OLA official Stephen Katz said.

The incident illustrates the UN's ambivalent relation to the Geneva Conventions. Nearly every member-State is a legal party to the conventions, and each has undertaken by ratifying them "to respect and to ensure respect" of the provisions. But donning the blue helmets seems to provide States a way to escape their legal obligations.

When States assign troops to peacekeeping duties, the forces answer formally and solely to the Security Council, says the UN. (This is something of a fiction, because in operational terms they are officered, equipped, deployed, moved about, and directed through a national chain of command — at the insistence of the United States and many other countries.) But the United Nations is not a party to the conventions. Sometimes, on the eve of deployments, the Security Council issues a statement reminding States of the applicability of the pertinent Geneva rules and the obligation to punish violations. Other times, the council "forgets" to mention the point.

When Iraq invaded Kuwait in 1990, the Security Council neglected for six weeks to mention the protections the Geneva Conventions guaranteed for civilians in Kuwait. When the council authorized the use of force to liberate Kuwait, the resolution failed to remind States in the coalition of their obligations as combatants under the Geneva Conventions or humanitarian law. In fact, one of the early sanctions resolutions violated the rule that requires free passage for many sorts of humanitarian aid intended for civilians, even civilians of an adversary. Concerning its operation in Bosnia-Herzegovina, as well as that of its recent peacekeeping operation in Cambodia, the Security Council issued no statement on the relevance of humanitarian law to the UN peacekeeping deployment.

Tension over the conventions reflects the different

institutional cultures of the UN and the International Committee of the Red Cross (ICRC). The UN's founding charter defined it as a body that would establish world peace — a lofty aim that seemingly precludes it from becoming a combatant or occupying power. The UN opted out of a role in the codification of the laws of war in 1949 with a condescending dismissal of the enterprise. "War having been outlawed, the regulation of its conduct has ceased to be relevant," the UN International Law Commission explained. For this reason, the drafting was undertaken under ICRC auspices in Geneva.

The arms-length attitude of the UN headquarters has its counterpart in the field. In the absence of a controlling international legal regime, and with ambiguous mandates that often drift from passive peacekeeping to active peace-enforcing, the military on the ground takes charge. Field commanders, bearing in mind the often-clearer priorities of their own governments, formally answer to a Security Council that is incapable of managing from long distance. Often the commanders pick and choose what they do based on their reading of the mandate. War crimes get short shrift. In Bosnia, UN personnel in mid-1992 visited Sonja's Kon-Tiki, a restaurant-pension outside Sarajevo, on whose grounds, according to the Bosnian government, was a Serb-run concentration camp. UN forces never asked questions, investigated, or protested, explaining that neither the UN command nor their governments had provided them any lists of concentration camps. In Somalia, when Canadian soldiers killed a Somali intruder in cold blood in March 1993, the Canadian commander did not punish the crime but covered it up. (Following an official inquiry, the Airborne Regiment involved was later disbanded.) Later that year, UN forces detained hundreds of Somalis then denied ICRC access to prisoners of war and persisted until the ICRC suspended all operations in protest.

The anomaly troubles many thoughtful UN officials. The

Serb-run camp was "so blatant" a violation of international law, said Kofi Annan, now the UN Secretary-General. "They should have seen it and reported. And in fact if they had reported, it is the sort of thing that would have gone public much earlier than it did." As for the UN legal office's view of the conventions, "We have asked them to respect the Geneva Conventions whether we signed it or not." But he also expressed understanding for troops in the absence of explicit Security Council mandates. "Soldiers like to have a clear mandate," he said. "They will not go out of their way" to look for war crimes.

The ICRC's ideal solution, according to a senior official, is to "declare openly that UN troops are bound by international humanitarian law and that everyone under the UN flag will be informed, trained, and monitored." Whether that will occur is unclear. ICRC and UN experts have discussed since 1993 a set of guidelines governing UN forces in combat, and it was still in the drafting stage at the time of writing. A draft in early 1998 required UN troops only to "respect the principles and spirit of international humanitarian law," without binding them legally; a later draft asserted the applicability of the Geneva Conventions by virtue of the fact that UN members are party to the treaties. But both drafts envisioned that a UN soldier who commits a prohibited act could be tried by his own government but not by another State or by a tribunal, thus averting universal jurisdiction. "We fought and lost that battle," commented an ICRC legal expert. ICRC officials, asserting that universal jurisdiction applies nevertheless, hope that the establishment of an International Criminal Court will set a new standard that UN peacekeepers will not be able to ignore.

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APPENDIX W

5 USCS § 706 (2005)

§ 706. Scope of review

To the extent necessary to decision ad when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§ 628. Special selection boards

(a) Persons not considered by promotion boards due to administrative error.

(1) If the Secretary of the military department concerned determines that because of administrative error a person who should have been considered for selection for promotion by a promotion board was not so considered, or the name of a person that should have been placed on an all-fully-qualified-officers list under section 624(a)(3) of this title [10 USCS § 624(a)(3)] was not so placed, the Secretary shall convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion.

(2) A special selection board convened under paragraph (1) shall consider the record of the person whose name was referred to it for consideration as that record would have appeared to the board that should have considered him. That record shall be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration for selection for appointment to a grade other than a general officer or flag officer grade, the person shall be considered to have failed of selection for promotion.

(b) Persons considered by promotion boards in unfair manner.

(1) If the Secretary of the military department concerned determines, in the case of a person who was considered for selection for promotion by a promotion board but was not

selected, that there was material unfairness with respect to that person, the Secretary may convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. In order to determine that there was material unfairness, the Secretary must determine that--

(A) the action of the promotion board that considered the person was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the person whose name was referred to it for consideration as that record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration, the person incurs no additional failure of selection for promotion.

(c) Report of boards.

(1) Each special selection board convened under this section shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing the name of each person it recommends for promotion and certifying that the board has carefully considered the record of each person whose name was referred to it.

(2) The provisions of sections 617(b) and 618 of this title [10 USCS §§ 617(b) and 618] apply to the report and proceedings of a special selection board convened under this section in the same manner as they apply to the report and proceedings of a selection board convened under section 611(a) of this title [10 USCS § 611(a)]. However, in the case of a board convened

under this section to consider a warrant officer or former warrant officer, the provisions of sections 576(d) and 576(f) of this title [10 USCS §§ 576(d) and 576(f)] (rather than the provisions of sections 617(b) and 618 of this title [10 USCS §§ 617(b) and 618]) apply to the report and proceedings of the board in the same manner as they apply to the report and proceedings of a selection board convened under section 573 of this title [10 USCS § 573].

(d) Appointment of persons selected by boards.

(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade a person whose name was referred to it for consideration, that person shall, as soon as practicable, be appointed to that grade in accordance with subsections (b), (c), and (d) of section 624 of this title [10 USCS § 624]. However, in the case of a board convened under this section to consider a warrant officer or former warrant officer, if the report of that board, as approved by the Secretary concerned, recommends that warrant officer or former warrant officer for promotion to the next higher grade, that person shall, as soon as practicable, be appointed to the next higher grade in accordance with provisions of section 578(c) of this title [10 USCS § 578(c)] (rather than subsections (b), (c), and (d) of section 624 of this title [10 USCS § 624]).

(2) A person who is appointed to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon that appointment, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him. In the case of a person who is not on the active-duty list when appointed to the next higher grade, placement of that person on the active-duty list pursuant to the preceding sentence shall be only for purposes of determination of eligibility of that person for consideration for promotion by any subsequent special selection board under this

section.

(e) Deceased persons. If a person whose name is being considered for referral to a special selection board under this section dies before the completion of proceedings under this section with respect to that person, this section shall be applied to that person posthumously.

(f) Convening of boards. A board convened under this section--

(1) shall be convened under regulations prescribed by the Secretary of Defense;

(2) shall be composed in accordance with section 612 of this title [10 USCS § 612] or, in the case of board to consider a warrant officer or former warrant officer, in accordance with section 573 of this title [10 USCS § 573] and regulations prescribed by the Secretary of the military department concerned; and

(3) shall be subject to the provisions of section 613 of this title [10 USCS § 613].

(g) **Judicial review.**

(1) (A) A court of the United States may review a determination by the Secretary of a military department under subsection (a)(1) or (b)(1) not to convene a special selection board in the case of any person. In any such case, the court may set aside the Secretary's determination only if the court finds the determination to be--

(i) arbitrary or capricious;

(ii) not based on substantial evidence;

(iii) a result of material error of fact or material administrative error; or

(iv) otherwise contrary to law.

(B) If a court sets aside a determination by the Secretary of a military department not to convene a special selection board under this section, it shall remand the case to the Secretary concerned, who shall provide for consideration by such a board.

(2) A court of the United States may review the action of a

special selection board convened under this section or an action of the Secretary of the military department concerned on the report of such a board. In any such case, a court may set aside the action only if the court finds that the action was--

(A) arbitrary or capricious;

(B) not based on substantial evidence;

(C) a result of material error of fact or material administrative error; or

(D) otherwise contrary to law.

(3) (A) If, six months after receiving a complete application for consideration by a special selection board under this section in any case, the Secretary concerned has not convened such a board and has not denied consideration by such a board in that case, the Secretary shall be deemed for the purposes of this subsection to have denied the consideration of the case by such a board.

(B) If, six months after the convening of a special selection board under this section in any case, the Secretary concerned has not taken final action on the report of the board, the Secretary shall be deemed for the purposes of this subsection to have denied relief in such case.

(C) Under regulations prescribed under subsection (j), the Secretary of a military department may waive the applicability of subparagraph (A) or (B) in a case if the Secretary determines that a longer period for consideration of the case is warranted. Such a waiver may be for an additional period of not more than six months. The Secretary concerned may not delegate authority to make a determination under this subparagraph.

(h) Limitations of other jurisdiction. No official or court of the United States may, with respect to a claim based to any extent on the failure of a person to be selected for promotion by a promotion board--

(1) consider the claim unless the person has first been referred by the Secretary concerned to a special selection board convened under this section and acted upon by that board and the report of the board has been approved by the President; or

(2) except as provided in subsection (g), grant any relief on

the claim unless the person has been selected for promotion by a special selection board convened under this section to consider the person for recommendation for promotion and the report of the board has been approved by the President.

(i) Existing jurisdiction. Nothing in this section limits--

(1) the jurisdiction of any court of the United States under any provision of law to determine the validity of any law, regulation, or policy relating to selection boards; or

(2) the authority of the Secretary of a military department to correct a military record under section 1552 of this title [10 USCS § 1552].

(j) Regulations.

(1) The Secretary of each military department shall prescribe regulations to carry out this section. Regulations under this subsection may not apply to subsection (g), other than to paragraph (3)(C) of that subsection.

(2) The Secretary may prescribe in the regulations under paragraph (1) the circumstances under which consideration by a special selection board may be provided for under this section, including the following:

(A) The circumstances under which consideration of a person's case by a special selection board is contingent upon application by or for that person.

(B) Any time limits applicable to the filing of an application for such consideration.

(3) Regulations prescribed by the Secretary of a military department under this subsection may not take effect until approved by the Secretary of Defense.

(k) Promotion board defined. In this section, the term "promotion board" means a selection board convened by the Secretary of a military department under section 573(a) or 611(a) of this title [10 USCS § 573(a) or 611(a)].

APPENDIX Y CLASS ACTION COMPLAINT

UNITED STATES DISTRICT COURT Index No.
EASTERN DISTRICT OF NEW YORK CV-00-745

CLASS ACTION
COMPLAINT
FOR SPECIFIC
AND EQUITABLE
RELIEF FROM
STATUTORY AND
CONSTITUTIONAL
VIOLATIONS BY
EXECUTIVE
AGENCIES

PAUL D. KERIAN, AND SIMILARILY SITUATED
Plaintiff(s)

V.

LOUIS CALDERA, SECRETARY OF THE ARMY, THE PENTAGON, WASHINGTON, DC 20310; WILLIAM S. COHEN, SECRETARY OF DEFENSETHE PENTAGON, WASHINGTON, DC 20301; JANET RENO, UNITED STATES ATTORNEY GENERAL950 PENNSYLVANIA AVE NW WASHINGTON DC 20530; TOGO D. WEST, SECRETARY OF VETERANS AFFAIRS; VERMONT AVENUE NW, WASHINGTON DC 20420

Defendants

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1. Now comes Paul D. Kerian, Plaintiff, on behalf of himself and similarly situated in satisfaction of Federal Rule of Civil Procedure 23 incorporating and re-alleging the averments, allegations and prayers of paragraphs 1 - 65 of

the initial complaint filed 4 February 2000 and assigned to The Honorable J. Trager as amended by a 1st Amended Complaint filed herewith in Federal District Court for the Eastern District of New York and respectfully states as follows:

2. Plaintiff asserts his standing to bring this suit exists under Article III art. § 2 of the United States Constitution reposing jurisdiction in this court pursuant to Federal Question Jurisdiction 28 USC § 1331, to hear "cases" and "controversies." Imposing (1) an injury in fact; (2) traceable to the defendant's challenged conduct; and (3) likely to be redressed by a favorable decision of this Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), The Federal Class Action Practice Manual ©1999, Timothy E. Eble.

3. "[I]njury in fact" is "distinct and palpable" and not "abstract," "conjectural," or "hypothetical." Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). In the case at bar Plaintiff and similarly situated suffer the injuries detailed in the initial complaint paragraphs 1-65 of the 1st Amended Complaint and as particularized with respect to class action issues herein. Warth v. Seldin, 422 U.S. 490, 502, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

4. Resolution of the standing question precedes any determination under Rule 23. See German v. Federal Loan Home Mortgage Corp., 885 F. Supp. 537, 547 (SONY 1995); Vulcan Society of Westchester County v. Fire Dept. of City of White Plains, 82 F.R.D.379, 398 (SONY 1979). Standing may be continuously reassessed and must be established by evidence appropriate to each stage of the litigation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)

Plaintiff has suffered injury and wrongful deprivation of physical, emotional, professional, fundamental and

Constitutionally grounded human rights as well as direct and indirect financial loss with respect to each of the four classes for which he requests this Court's certification. He has standing as a class representative because he reasonably "possess[es] the same interest and suffer the same injury shared by all members of the class" represented. East Tex. Motor Freight Sys. Inc. v. Rodriquez, 431 U.S. 395, 403 (1977); Schlesinger v Reservist Comm. to Stop the War, 418 U.S. 208, 216, 94 S.Ct 2925, 41 L.Ed 2d 706 (1974).

6. DEFENDANTS: The Defendants are all heads of Federal Executive Branch agencies responsible for executing the Federal laws, regulations, programs and policies at issues.

7. JURISDICTION: Federal Question Jurisdiction 28 USC § 1331 is uniquely appropriate to the issues at bar as it is by definition substantive federal law that governs the case from the outset. A.I. Trade Finance, Inc. v Petra Int'l. Banking Corp., 62 F3d 1454, 1459 (DC Cir. 1995). The federal laws at issue are implicit and explicit throughout the 65 paragraph complaint as once amended, which this Class Action Complaint builds upon and hereby incorporates by reference. Louisville & Nashville Railway Co. v Mottley, 211 U.S. 149, 29 S.Ct 42, 53 L.Ed 126 (1908).

8. CLAIMS FOR RELIEF: Relief sought for members of the class include those requested by Plaintiff in his 1st Amended complaint as supplemented by any further relief thought necessary by this Court to do substantial justice to the classes and any sub classes constituted under the Court's supervision.

9. The Plaintiff requests constitution of four discrete Class Actions related to the 5 claims for relief of the 1st Amended Complaint. CLASS ACTION I include the substantive claims for relief described in two different Claims for relief (1st and 2nd Claim(s) for Relief). The 1st Claim at Para. 43-

49, pp22-24 , and the ; 2nd claim for relief , Para. 50-53 pp24-25 of the 1st Amended Complaint relate to DOD policy and practice as it relates to maintaining and defending the rule of law. Like the Plaintiff, the members of Class Action I were, are, and will be, absent judicial intervention, deprived the right to comply with the Geneva Conventions during the Persian Gulf War and future conflicts. A subclass may be constituted of those who resisted these war crimes and suffered reprisal, pecuniary loss, Persian Gulf Syndrome, loss of civil rights, emotional pain and suffering. Equitable relief is sought (judicial mandate) to correct systemic problems such as the inadequate training on the rule of law leaving service members unequipped to vindicate or enforce the rule of law. The court is also asked to use it's equity powers to correct the process of impunity maintenance used to frustrate Congressionally mandated instruments of transparency and accountability and improper lobbying activities. Class Action I are those injured and who fear future injury by the pattern and practice of impunity and reprisal within executive branch judicial process used to immunize responsible persons and punish those who refused to be complicit. A process aided by the defective conflicted command climate and defective and conflicted ethical system described in the Code of Professional Responsibility governing the activities of Military Judge Advocates.

10. CLASS ACTION II, Third claim for relief , Para. 54-57, pp25-26 is comprised of disabled Veterans who are forced to pay back their disability pay three times.

11. CLASS ACTION III , Forth claim for relief, Para. 58-61, pp 26-27 is comprised of "illegitimate" children, persons, agencies and sovereign states denied support and or recompense by DOD non-cooperation, interference in paternity establishment and child support.

12. CLASS IV, Fifth Claim for relief, Para. 62-64, page 28 is comprised of Department of Justice employees who like the Plaintiff work in non attorney positions but are nonetheless denied the opportunity to practice their profession by Constitutionally infirm policies.

13. CLASS ACTION AVERMENTS: Plaintiff meets definiteness, determinability numerosity, commonality, typicality, and adequacy of representation criteria for each of the requested classes. As described in the first amended pleading,. Plaintiff's injuries and complaints describe four classes of persons each of which possess attributes and commonalties yielding identifiable classes of similarly situated. The tests for certification, at this juncture, are not stringent, plaintiff must merely show that the general outlines of the membership of the class are determinable at the outset of the litigation. 7A Wright & Miller, Federal Practice and Procedure § 1760 at 118; Bailey v. Patterson, 369 U.S. 31, 33, 7 L. Ed. 2d 512, 82 S. Ct. 549 (1962). Based upon the facts and injuries alleged, a class is sufficiently definite "that it is administratively feasible for the court to determine whether a particular individual is [or is not] a member". Wright & Miller at 121.

14. Plaintiff need not establish his own case on the merits before a determination of class certification is made by the court. Eisen v Carlisle & Jacquelin, 417 U.S. 156, 94, S.Ct 2140, 40 L.Ed 732 (1974). A court should generally take the plaintiffs' allegations as true and not determine the merits of the underlying claims in determining if class certification is appropriate. See Hardin v. Harshburger, 814 F. Supp. 703, 706 (ND Ill 1993 and Barnes v. The American Tobacco Company, 161 F.3d 127 (3d Cir. 1998). It is however, appropriate for a court to "probe behind the pleadings before coming to rest on the certification issue." Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570 (11th Cir. 1992).

15. Certification of a class action requires the action meet the requirements of a two-step test. Initially, as a first step, the action must satisfy all four of the prerequisites mandated by subsection (a) of Rule 23, FRCP. These prerequisites are: (1) numerosity of the parties; (2) commonality of legal and

factual issues; (3) typicality of the claims and defenses of the class representative; and (4) adequacy of representation. In re A.H. Robbins Co., Inc., 880 F.2d 709, 727-28 (4th Cir), cert denied, 493 U.S. 959, 110 S.Ct 377, 107 L.Ed 2d 362 (1989) See also Eisen v Carlisle & Jacquelin, 417 U.S. 156, 162, 94 S.Ct 2140, 40 L.Ed 2d 732 (1974)

16. Having plead and established satisfaction of the four prerequisites to Class Action certification pursuant to FRCivP 23(a), the second step to Class Action certification demands the action fit within one or more subsections of (b) of the rule. It is Plaintiff's position that Class certification under any and all subsections of FRCivP 23 (b) is appropriate. An action may qualify under (b)(1)(A), the first of such categories, if individual adjudication of the controversy would prejudice any party opposing the class. The Federal Government a self insured entity cannot be heard to speak of "disadvantage" when its "illegitimate" policies violate the fundamental rights of the vulnerable of its society. Alternatively, (b)(1)(B) may be applicable if the class members themselves may be prejudiced. Here Plaintiff submits and appropriate remedy can be fashioned allowing case and issue specific opt out to allow a fair resolution of the issues in every case. Subsection (b)(2) provides for suits for injunctive or declaratory relief. As indicated by the pleadings and request for relief the package of remedies needed to correct the injustices presented with respect to children, service members and veterans and federal employees denied fundamental rights in the nature of civil rights all require equitable relief" The final category, (b)(3), applies where there are common issues of law or fact, and the class action device has superiority over any other available procedures for disposing fairly and efficiently of the controversy. See Lerch v Citizens Bancorp., Inc., 144 F.R.D. 247, 250 (DNJ 1992). Although this provision (b0(3) certainly applies in the alternative Plaintiff submits the case is so strong for Class Certification under the other provisions that recourse to this residual catch all provision may be

unnecessary.

17. Plaintiff acknowledges that as the party seeking certification he bears the burden of establishing that all prerequisites are met. Plaintiff recognizes that he must shoulder this burden of proof throughout the proceedings as this Court defines, redefines, sub-classifies and or decertifies the classes in whole or in part as appropriate in response to the progression of the case from assertion to facts. To the extent subclasses distinguish themselves Plaintiff requests they be duly constituted. Rule 23 FRCivProc(c)(4) states: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses, the provisions of this rule shall then be construed and applied accordingly." Subclasses must satisfy the same class action requirements as any class before they may be certified i.e., Each subclass must independently meet all the requirements of 23(a) and at least one of the categories specified in 23(b). Roby v. St. Louis Southwestern Ry. Co., 775 F.2d 959, 961 (8th Cir. 1985).

18. The ultimate issue is whether the class is too large to make joinder impracticable. See Strykers Bay Neighborhood Council v. City of New York, 695 F. Supp. 1531, 1538 (SDNY 1988). The term "Impracticable" does not mean impossible. Robidoux v Celani, 987 F2d 931, 935 (2d Cir. 1993). Impracticability itself depends the specific facts of each case. See General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 329, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980). Courts will find that the "numerosity" requirement has been satisfied when the class comprises forty or more members and may find that it has not been satisfied when the class comprises twenty-one or fewer. See Ansari v. New York University, 179 F.R.D. 112, 114 (SDNY 1998); Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 40 (SDNY 1990); Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.), cert. denied, 515 U.S. 1122

(1995) The court has wide discretion in deciding the issue of numerosity. FRCP 23(a)(1).

19. It is not necessary that the plaintiffs identify the exact number of class members involved; courts have often used common sense - the number of potential plaintiffs in the class is one factor but not the exclusive consideration. If identification of class members is difficult, or geographic or other practical concerns realistically preclude joinder this criteria is met. In Ansari v. New York University, 179 F.R.D. 112, 114 - 15 (SDNY 1998), factors included: (1)[T]he judicial economy that will arise from avoiding multiple actions; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an effect on future class members. See Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993). It is a totality of circumstance test. See Gen. Tel. Co. of the Northwest, Inc. v EEOC, 446 U.S. 318, 100 S.Ct 1698, 64 L.Ed 2d 319 (1980).

20. In Robidoux v Celani, 987 F.2d 931, 935 (2d Cir. 1993) the appellate court held the district court erroneously ruled numerosity was absent, because plaintiffs had not shown the class to be so large that joinder was impossible. The standard of "impossibility" was held by the court to be incorrect. Plaintiffs need not demonstrate with precision the number of persons in the purported class to satisfy the requirements that joinder is impracticable where such a conclusion may be reached from reasonable estimates. Gen. Tel. Co. of the Northwest, Inc. v EEOC, 446 U.S. 318, 330, 100 S.Ct 1698, 64 L.Ed 2d 319 (1980).

21. Geography of Individual Members. The greater the area in which the members of a class are geographically dispersed, the more impractical it is to join those class members in litigation. See Dameron v Sinai Hosp. of Baltimore, Inc., 595 F. Supp 1404, 1408 (D Md 1984) , aff'd

in part and rev'd in part 815 F.2d 975 (4th Cir. 1987); In re Southeast Hotel Properties Limited Partnership Investor Litig, 151 F.R.D. 597, 601 (WDNC 1993). Widespread disbursement of class members mitigates toward the propriety of certification. Cf. United Brotherhood of Carpenters and Joiners of America Local 899 v Phoenix Associates, Inc, 152 F.R.D. 518, 522 (SD W Va 1994).

22. When, as in the instant case, the plaintiff adequately describes the class of persons he wishes to represent exists, the fact that they are not specifically identifiable supports rather than bars the bringing of a class action because joinder is impracticable. Further, it is not necessary that the members of the class be so clearly and completely identified that any member can be presently ascertained. Haywood v Barnes, 109 F.R.D. 568, 576 (EDNC 1986). When as here illegitimate children and equitable relief may have prospective impact on a large group of combat veterans, present and future service persons engaged in military operations, disabled veterans, and large numbers of Justice Department employees are involved, individual lawsuits may not be practical due to economic or other concerns, certification is favored to provide those people a remedy otherwise inaccessible.

23. The absence of individual suits indicates putative class will not receive the protection they need unless case is certified . When class members are in a poor position to obtain legal redress because they are ill-informed or because such relief is complex and expensive, certification is and should be favored. Gordon v Forsyth County Hosp. Auth., Inc., 409 F. Supp 708, 717 (MDNC 1976). If the relief sought and to which class members may be entitled is uniform throughout the class, certification of the class is favored.

24. It is fundamental to a "Class Action" that some facts or some legal interest must be "common" to the group for

"representation" to appropriately resolve the issue. A common question is one that arises from a "common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." Haywood v Barnes, 109 F.R.D. 568, 577 (EDNC 1986).

25. In classes and cases such as the instant classes involving challenges to allegedly improper or illegal schemes certification is proper based upon the common nucleus of operative facts present. See Molina v. Mallah Organization, Inc., 144 F.R.D. 37, 41 (SD NY 1992). The related claims raise questions of law and fact common to the class. The Rule 23(a)(2) requirement that there be 'questions of law or fact common to the class is satisfied if members of the class have been affected by a general policy of the defendant, and the general policy is the focus of the litigation. Haywood v Barnes, 109 F.R.D. 568, 577 (EDNC 1986). Although common issues do not necessarily make a case suitable for certification, common issues, the resolution of which will advance the litigation, make, in combination with other facts, certification increasingly appropriate.

26. Plaintiff's claimed classes are particularly apt because they involve questions of whether common defendants have acted through an illegal policy or procedure. Commonality is readily shown because the common question becomes whether the defendant in fact acted through the illegal policy or procedure. For this reason, cases of this should be and often are approved as class actions. A class action will often involve both questions common among the class membership and questions (such as damages in a personal injury lawsuit) individual to class members. Rule 23 does not require that every question of law or fact be common to every class member. See Haywood v Barnes, 109 F.R.D. 568, 577 (EDNC 1986); Port Auth. Police Benevolent Ass'n, Inc. v Port Auth. of New York and New Jersey, 698 F.2d 150 (2d Cir. 1983).

27. Subsection 23(a)(2] does not require that all, or even most, issues be common, nor that common issues predominate, but only that common issues exist." Although differences among the class members are relevant under other Rule 23 requirements, they not necessarily undermine commonality as long as the resolution of the common questions affects all or a substantial number of the members. If a benefit may be achieved through class disposition, the rule requires only that the resolution of common questions affect all or most of the class members and whether the benefits of class disposition will inure to the class were it to be certified. Dramatic differences may exist among class members as to the respective damages suffered by individual members. Varying damage levels rarely prohibit a class action if the class members' claims possess factual and legal commonality. Just as common issues of law are not required for all class members, common issues of fact are not required to be present among all class members. Haywood v Barnes, 109 F.R.D. 568, 577 (EDNC 1986).

28. Typicality: Named Plaintiff's Claims/Defenses Must be Typical of Class Rule 23(a) (3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P., 23(a)(3). There must be a nexus between the class representative's claims or defenses and the common questions of fact or law that unite the class. A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same events or pattern or practice and are based on the same legal theory.

29. Courts have uniformly held that a claim is typical if it arises from the same event or course of conduct giving rise to the claims of other class members and is based on the same legal theory. Dornberger v. Metropolitan Life Insurance Co., 182 F.R.D. 72 (SDNY 1998); Dura-Bilt Corp. v. Chase Manhattan Bank, 89 F.R.D. 87, 98 (SDNY 1981). This

requisite for typicality guarantees that the class representatives share issues common to other class members. To have standing to sue as a class representative, the plaintiff "must be part of the class and possess the same interest and suffer the same injury as the class members.") See also, General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). If, by advancing their own interests, the named plaintiffs also advance the interests of the proposed class, then the typicality requirement will have been met. Green v. Wolf Corp., 406 F.2d 291, 299 (2d Cir. 1968), cert. denied, 395 U.S. 977, 23 L. Ed. 2d 766, 89 S. Ct. 2131 (1969).

30. The issue is whether the named plaintiffs suffer the same sort of injuries, and possess sufficient similarity of interests to the absent class members, to make them proper class representatives. Plaintiffs who purport to represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Simon v Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 n 20, 96 S.Ct 1917, 48 L.Ed 2d (1976), quoting Warth v Seldin, 442 U.S. 490, 502, 95 S.Ct 2197, 2207, 45 L.Ed 2d 343 (1975).

31. Typicality exists so long as the claims are based on the same legal or remedial theory and no conflict of interest exists between the named plaintiff and the class members. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct that is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. Hanon v Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992).

32. Adequacy of representation by a plaintiff is ultimately a question of fact with respect to which the plaintiff must bear the burden of proof. Predmore v Allen, 407 F. Supp 1053,

1064 (D Md 1975). The adequacy standard is met if: (1) the named plaintiff has interests common with, and not antagonistic to, those of absent class members; and (2) the plaintiff's attorney is qualified, experienced and generally able to conduct the litigation. Sosna v Iowa, 419 U.S. 393, 403, 95 S.Ct 553, 42 L.Ed 2d 532 (1975) Both attorney and representative are considered on question of adequacy. As the number of named plaintiffs increases, so does the burden on counsel in the discovery phase of the case. Further, an excessive number of named plaintiffs can actually serve to complicate the proceedings and diminish adequacy. See Chill v. Green Tree Financial Corp., 181 F.R.D. 398 Gill v. Monroe County Dept. of Social Services, 79 F.R.D. 316, 330 (W.D.N.Y. 1978)(finding existence of 28 named plaintiffs would unnecessarily complicate proceedings, and directing plaintiffs to reduce their number).

33. The adequacy of plaintiffs' counsel should be presumed in the absence of evidence to the contrary. However, in deciding the adequacy of plaintiffs' counsel, the court may consider the reputation of the attorneys and their respective firms. Dornberger v. Metropolitan Life Insurance Co., 182 F.R.D. 72 (1998)(record revealed no indication of inadequacy on part of plaintiffs' counsel who had diligently prosecuted the case to date and must continue to do so).

34. Adequacy of representation does not require the named representatives have unique ability or complete understanding of the legal issues. The court in Haywood v Barnes, 109 F.R.D. 568, 579 (EDNC 1986), found the following elements demonstrated adequacy of class representatives: they shared a common interest with the putative class members; each named plaintiff had a personal financial stake in the suit; the named plaintiffs regularly consulted with their counsel; the named plaintiffs responded to discovery demands; the named plaintiffs appeared for deposition; all named plaintiffs supported the certification motion; there was no showing of inability of named plaintiffs

to make decisions required to protect the class; all of the named plaintiffs indicated familiarity with the practices challenged; there was no showing the named plaintiffs were unwilling to pursue the action or that they would disregard their obligation or duties as class representatives.

35. The Supreme Court has rejected insufficient knowledge of the named plaintiff as a basis for denying class certifications. In Surowitz v Hilton Hotels Corp, 383 U.S. 363, 86 S.Ct 845, 15 L.Ed 2d 807 (1996) the plaintiff was uneducated generally, illiterate in economic matters, and demonstrated in her oral testimony she knew nothing about the content of the suit. Despite the plaintiff's ignorance, the Supreme Court found no evidence of collusive conduct or trickery and reversed the appellate court's dismissal of the suit. See Meridith v Mid-Atlantic Coca Cola Bottling Co., 129 F.R.D. 130, 133 (ED Va 1989).

36. The plaintiffs should recognize their responsibilities to the class, and plaintiffs' counsel should be generally experienced in and able to handle the type of litigation before the court. The court must consider the abilities of both the attorneys who represent the class representatives and the class representatives themselves.

The named plaintiff should not have facially weak claims. Under Rule 23, the class representative's claim must be typical of the claims of the class, and the representative must be adequate. To judge the adequacy of representation, courts may consider the honesty and trustworthiness of the named plaintiff. Kline v. Wolf, 702 F.2d 400, 402-03 (2d Cir. 1983) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549-50 (1949).

37. The sections under subsection (b) of Rule 23 which are alleged to provide a basis for certification are as follows: Rule 23 (b)(1)(A) applies largely to lawsuits seeking declaratory or injunctive relief against the party opposing the class. Contrary rulings by different courts could create a

situation where a party may be ordered to engage in irreconcilable conduct. See Nat'l. Treasury Employees Union v Reagan, 509 F. Supp 1337 (DDC 1981). Thus, if a situation should arise in which different results in separate actions would result in the opposing parties' inability to pursue a clear course of conduct, certification under Rule 23(b)(1)(A) may be appropriate. United Brotherhood of Carpenters and Joiners of America Local 899 v Phoenix Associates, Inc., 152 F.R.D. 518, 523 (SD W Va 1994).

38. In a similar manner, if inconsistent declarations of liability could result from separate actions, certification of a class may be appropriate. However, the mere fact that some plaintiffs may prevail and some lose in separate lawsuits does not justify 23(b)(1)(A) certification. See In re Bendictin Products Liab. Litig., 749 F.2d 300 (6th Cir. 1994) A request for money damages generally does not subject the party opposing the class to incompatible standards of conduct. Zimmerman v Bell, 800 F.2d 386, 389 (4th Cir. 1986).

39. Rule 23(b)(2) "Injunctive or Declaratory Relief" provides certification may be appropriate if: [T]he prerequisites of subdivision (a) are satisfied, and in addition . . . "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Subsection (b)(2) class actions are "limited to those class actions seeking primarily injunctive or corresponding declaratory relief." Conte, 1 Newberg on Class Actions 3d § 4.11. See also, Zimmerman v Bell, 800 F.2d 386, 389 (4th Cir. 1986); Paxman v Campbell, 612 F.2d 848, 854 (4th Cir. 1980) cert denied, 449 U.S. 1129, 101 S.Ct 951, 67 L.Ed 2d 117 (1981).

40. The (b)(2) class "serves most frequently as the vehicle for civil rights actions an other institutional reform cases that receive class action treatment." Baby Neal v. Casey, 43 F.3d 48, 58 - 59 (3rd Cir. 1994). Indeed, (b)(2) was "designed for

civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." Barnes v. The American Tobacco Company, 161 F.3d 127 (3rd Cir. 1998) citing Conte, 1 Newberg on Class Actions 3d § 4.11. See also, Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998)("As the Advisory Committee Notes explain, 23(b)(2) was adopted in order to permit the prosecution of civil rights actions.") Thus, in the context of civil rights litigation seeking declaratory relief for violation of constitutional rights, Rule 23(b)(2) actions have been held to be particularly appropriate. Johns v DeLeonardis, 145 F.R.D. 480, 484 (ND Ill 1992).

41. On the other hand, "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985).

42. Section (b)(2) was discussed in Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir.) cert. denied, 421 U.S. 1011, 44 L. Ed. 2d 679, 95 S. Ct. 2415 (1975). The Court noted that "by its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action." Id. at 248. "The very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class." Id. at 256. Because a (b)(2) class must be homogeneous and cohesive, a class can be certified under subsection (b)(2) only where the defendant has acted in the same way toward all members of the class, or has acted on grounds applicable to all members of the class.

43. Generally, in cases wherein certification is sought pursuant to Rule 23(b)(2), the defendant has engaged in past or continuing conduct applicable to the class. The action for an injunction seeks to maintain the status quo or to require

remedial action as a result of the conduct in question. For example, while certifying a 23(b)(2) class in a dispute arising from charges posted to AT&T calling cards, the court noted that the claims alleged by the named plaintiffs would "resemble those of others who succumbed to the allegedly fraudulent campaign." Gleb v Amer. Tel. & Tel. Co., 150 F.R.D. 76, 77 fn. 3 (SDNY 1993). Thus, there was a pattern of activity with respect to the class.

44. In Greenway v. Information Dynamics, Inc., 399 F. Supp. 1092 (D. Ariz. 1974), aff'd, 524 F.2d 1145 (9th Cir. 1975), plaintiffs claimed that the defendant's practice of distributing to subscribers a list of persons whose checks had been returned by their banks without payment violated the Fair Credit Reporting Act. A class was certified consisting of all persons whose names appeared on the lists collected and disseminated by the defendant. All the class members in Greenway were being treated in the same way by the defendant, and if the defendant's practice of distributing such lists was illegal, all class members were entitled to relief.

45. In a number of cases, Rule (b)(2) or (b)(3) has also been held to permit actions to proceed for medical monitoring in toxic tort cases. See, e.g., Simmons v. Pacor, Inc., 543 Pa. 664, 674 A.2d 232 (Pa. 1996)(plaintiffs with asbestos related asymptomatic pleural thickening permitted to recover for medical monitoring under state rules); Gibbs v. E.I. Dupont de Nemours & Co., 876 F.Supp 475 (WDNY 1995)(exposure to chemicals; Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287 (1987); Fried v. Sungard Recovery Serv., Inc., 925 F. Supp. 372 (ED Pa. 1996).

46. As another example of a (b)(2) action, in a suit for injunctive and declaratory relief, a public school teacher sought to halt the deduction of union fees from wages of nonunion teachers. Their claim was based on an alleged violation of their First and Fourteenth Amendment rights. Finding a pattern of activity applicable class wide,

certification was granted. George v Baltimore City Public Schools, 117 F.R.D. 368, 372 (D Md 1987).

47. There is authority for permitting the award of monetary damages incidental to equitable relief in a Rule 23(b)(2) class. See Parker v Local Union 1466, United Steelworkers of America, 642 F.2d 104, 107 (5th Cir. 1981) (trial court did not err in awarding damages, because the terms of subsection 23(b)(2) do not preclude monetary relief). However, damages are permitted in such cases only when they award relief "incidental" to the primary claim for injunctive relief. See Probe v State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.), cert denied, 476 U.S. 1170 (1986); Robinson v Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir. 1971), cert dismissed, 404 U.S. 1006, 92 S.Ct 573, 30 L.Ed 2d 655 (1972). Further, an attempt to obtain primarily legal damages may not be pursued under the guise of a claim for injunctive or declaratory relief. See Barnes v. The American Tobacco Company, 161 F.3d 127 (3rd Cir. 1998).

48. Rule 23(b)(2) actions are not "opt-out" classes and notice is not mandatory in such cases. If a case involving substantial compensatory damages is allowed to proceed under the guise of a (b)(2) class action, individual rights and protections are implicated. When Rule 23 was amended in 1966, the Advisory Committee noted that this section "does not extend to cases in which the appropriate final relief relates exclusively or predominately to monetary relief." Horowitz v Pownall, 105 F.R.D. 615, 619 (D Md 1985).

49. Under Rule 23(b)(3) common issues must predominate for class certification. No such requirement exists under Rule 23(b)(2). Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998). "It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." Id.

50. Rule 23(b)(3) "Common Questions of Law or Fact" Rule 23(b)(3) applies to actions known as "opt-out" classes and provides as follows: [T]he prerequisites of subdivision (a) are satisfied, and in addition . . . "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U. S. C. App., p. 697. The matters pertinent to the findings include: The interest of members of the class in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; the difficulties likely to be encountered from the management of a class action.

51. Section 23(b)(3) requires a court to determine whether questions of law or fact common to members of the class predominate over any questions affecting only individual members. Eisen v Carlisle & Jacquelin, 417 U.S. 156, 164, 94 S.Ct 2140, 40 L.Ed 2d 732 (1974); Marisol v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)(per curiam); In assessing whether common question predominate, most courts have adopted a pragmatic approach, analyzing the basic elements of all civil claims, and emphasizing the efficiencies of class treatment, the significance of common question and whether class certification would result in the serious distortion of the lawsuit. See Windham v American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (en banc), cert denied 435 U.S. 968, 98 S.Ct 1605, 56 L.Ed 2d 58 (1978).

52. If the action complained of on behalf of the putative class members arises out of a single set of operative facts, then the commonality requirement will have been satisfied. If that common nucleus of operative facts forms the central issue in the case, even if individualized issues of proof are present, the requisite predominance will be found. If the liability issue is common to the class, common questions are held to predominate over individual ones. Dornberger v. Metropolitan Life Insurance Corp., 182 F.R.D. 72 (SDNY 1998):

53. Rule 23(b)(3), requires the district court determine that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Where class members are likely to be sufficiently numerous and to possess relatively small claims unworthy of individual adjudication due to the amount in each one, the mechanism of the class action is deemed to be superior. Dornberger v. Metropolitan Life Insurance Corp., 182 F.R.D. 72 (SDNY 1998); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968).

54. A common nucleus of operative facts among class members mitigates toward class certification. Molina v. Mallah Organization, Inc., 144 F.R.D. 37, 41 (SD NY 1992) Presence of claims related to alleged scheme on the part of defendants raises questions of law and fact common to the class. It is also usually enough to satisfy the commonality requirement of Rule 23(a)(2). Common nuclei of fact are typically manifest where the defendants have engaged in standardized conduct towards members of the proposed class. See Chandler v. Southwest Jeep-Eagle, Inc., 162 F.R.D. 302, 308 (ND Ill 1995)(citing cases) Factual variations among class members as to their grievances do not defeat a class action. See Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980).

55. The requests for Joint and equitable relief inuring to benefit of all Class strongly mitigates toward certification. If

the class members properly request joint relief for an injury or harm, common questions will almost invariably be present. Rule 23(a)(2) does not require that all or even most issues be common nor that common issues predominate but only that common issues exist. See Holsey v Armour & Co., 743 F.2d 199, 216-217 (4th Cir. 1984), cert denied, 470 U.S. 1028, 105 S.Ct 1395, 84 L.Ed 2d 784 (1985). If a question of law, its applicability or effect is generally common among the class representatives and the absent class members, certification is favored. Cf. Califano v Yamasaki, 442 U.S. 477, 481, 99 S.Ct 2432, 61 L.Ed 2d 176 (1979).

56. PRAYER FOR RELIEF: Plaintiff prays that the relief requested in the 1st AMENDED COMPLAINT and this CLASS ACTION COMPLAINT are granted, the classes certified as requested and the relief prayed for afforded by this court.

57. DEMAND FOR JUDGE MENT Class certification, judgments mandates and declaratory relief entered on the claims asserted, and further relief granted in equity and law as may be appropriate under the circumstances, including the award of prejudgment costs, expenses and attorney fees.

Respectfully Submitted,
Dated: February 3, 2000

Original signed
PAUL D. KERIAN, PRO SE PLAINTIFF
195 E. Argyle St, Valley Stream, NY 11580
Tel (516) 825-3835

APPENDIX Z

ADMITTED TO PRACTICE: MD, NY, ND, MN &U. S. SUPREME COURT EXPERIENCED FORMER SPEC. ASST. U. S. ATTY LAW REVIEW EDITOR
PAUL D. KERIAN
ATTORNEY AT LAW
SUITE 4
105 WEST BEL AIR AVE.
ABERDEEN, MD 21001
TELEPHONE & FACSIMILE
(410) 2722-464

March 25, 1994

Through: Mr. Lawrence M. Baskir
Acting General Counsel
Department of the Army
Washington, DC 20310-1718

Through: General Counsel, Department of Defense

To: The Secretary of Defense

SUBJECT: 14 February, 1994 response to my 8 December 1992 FOIA/PA request.

Dear Sirs, As we know the Army policy is to process FOIA requests as if they contained a simultaneous request under the Privacy Act. Kindly compare the operative language of my 8 Dec. 1992 FOIA/PA request (reproduced below in bold finer print) to the breadth and substance of your response dated 14 February 1994. Compare the dates on these two document. The delay introduced into this matter is unconscionable! Consider the breadth of my request, the

almost laughable non-responsiveness of your denial and ask yourself if Congressional intent is being vindicated in your department(s).

I have no desire to enter into litigation, bring political pressure to bear, or to go to the media regarding the inner workings and mistakes of an executive branch agency for whom I wish to work. What I would like to see is something besides cover-ups and the good old boy crony syndrome at work. Please have one of your trusted subordinates call me on the phone at my letterhead address so that we might discuss a reasonable resolution to these difficulties.

Ever since my exposure to the ability of high ranking American Military officers in the Persian Gulf to rationalize the most blatant violations of the law of war, I have been uncomfortable with the machinery of the Department of Defense. It is indeed an organizational sickness which instills in fine officers a career orientation such that they seem incapable of dealing with the truth or doing simply what is right! I have suspected that these (situational) incompetents, operating at their level of unethical disservice, were capable of unwittingly enlisting well intentioned people into a conspiracy to obstruct justice. Gentlemen, the correspondence of 14 February 1994 aggravates my worst suspicions.

The comedy of errors and "cover-ups" is painful to recount. I speak of the refusal of the IG to investigate, the refusal of the ABCMR to review the IG's refusal to investigate, the refusal to honestly consider my requests for information. And, always, the unacceptable delay. The problems can be resolved if you direct that your employees reasonably cooperate and provide me the information and fundamental Due Process I so reasonably request.

If a fair inquiry means that people of medium to high rank within your organizations are shown to be deficient, so be it.

It will be with full appreciation of their past good service etc. that remedial action can be pursued. For the good of our nation we must address the blatant lawlessness and lack of idealism obviously thriving in DOD.

Consider only a few of the relevant facts to date. After filing my whistle blower complaint, the only IG investigator I ever spoke with, during the entire investigation, called me up (from Europe!) very early one morning, as I left to go to work, and misrepresented the nature of his call! His investigative transcripts are full of blatant inaccuracies and outright misrepresentations! Yet the ABCMR sent my appeal of this report (clearly establishing these deficiencies) back to me, refusing to even consider it! Despite the fact that they are the only agency which can resolve the issues surrounding the deprivation of my Meritorious Service Medal in retaliation for my honest legal advice.

Consider the enclosed copy of my subsequent appeal to the OER Special Review Board, currently being processed with seemingly obligatory delay. This recounts only a small part of the problems and illegalities of officers in the Gulf I attempted to redress with a little honesty. Please reconsider your 14 February 1992 denial of my FOIA/PA request and provide me the information I requested 8 Dec. 1992.

The scope of my 8 Dec., 1992 was as follows:

I request[ed] the following: all portions of the IG investigation I have been denied, including exhibits 2,3,4,6, and 8 of the Army IG investigation; complete copies of the field working papers, including complete interview transcripts, evidence and notes in the files indicated at para 13 of MAJ Hergenroeder's report; copies of any collateral, independent or related investigations into the facts, circumstances and issues addressed in my whistle blower protection petition; and, complete copies of any collateral, independent, or related ethics investigations conducted by

Defense Department Counsel and/or Military Judge Advocates.

Thank you.
Sincerely,

Encls
Paul D. Kerian

PAUL D. KERIAN

P.O. Box 176 Darlington,
MD 21034 (410) 457-4835

October 25, 1994

Inspector General
ATTN: Ms. Jane Deese
Department of Defense
400 Army Navy Drive
Arlington, Virginia 22202-2884

Subject: CASE NO. 94 – L58322; Military Whistle Blower Protection 10 U.S.C. 1034, DOD Dir. 7050.6

RE: Concerning 30 November 1993, Officer Efficiency Report (OER) appeal of CPT Paul D. Kerian, and the 29 August 1994 result of that appeal.

Dear Ms. Deese,

Thank you for your phone call of 24 October 1994, and agreeing to grant me a personal interview on issues presented by my subject complaint. I understand about limited travel

budgets and will attempt to arrange other or additional business in D.C. on the day of our meeting. I know where the Pentagon is and should not have much difficulty finding you in a building across the street. Is there a specific subway stop I should use?

As n aid to your investigation and so that I can be of assistance to you in responding to the type of specific questions you asked me over the phone, I have prepared a list of questions for you to certify to each member of the OER Special Review Board and the professional and administrative support staff which supports the panel. You have probably already asked these and many more questions but I thought I would make sure before I made the trip. In case you, as an IG, would be constrained from providing me with the results of these questions, I made request independently under the Freedom of Information Act. Kindly forward a copy of these questions to the information release officer. I request waiver of costs as the information requested is to vindicate public interests.

I believe you will agree that these type of questions are the minimum necessary to being in the investigation. With answers to these questions from the OER Special Review Panel and staff, I will be able to provide you with specific answers to your specific questions.

Preliminary Questions:

1. Who (all) reviewed my OER appeal? a) when and where? b) who selected the panel of officers which reviewed my appeal? c) how were these officers selected to adjudicate my case? d) provide copies of the assignment order assigning my appeal with a specific panel(s).

2. Who underlined specific portions of my OER appeal with a blue pen?

3. Who underlined with a black pen? Who highlighted with a highlighter?
4. Who consulted a legal advisor on any issues presented in my appeal?

5. Name any and all legal advisors consulted.

6. Who consulted: military officers, NCOs, witness, evidence, or subject matter experts concerning the matters and issues presented in my complaint? When and where did this happen?

7. Who on the Special Panel has worked with (same installation), been stationed or served with (same division or smaller military organization) gone to school with military or civilian school served with or knows personally Col. Richard Pomager, MP officer; (BG) Col. Walter Huffman, JA, former VII Corps and CENTCOM SJA; Col Rupert, former CENTCOM SJA; BG Thomas Cutbert, office of TIAG? Describe the quality and nature of the contact or relationship with the 4 officers above if any positive responses is indicated by OSRB members.

8. Were there any ex parte communications by any member of the Special Panel, or their administrative support or advisory staff, with of the people in 7 above? When? Describe nature of communication.

9. Was there a separate panel which independently heard the procedural and substantive aspects of my OER appeal? Answer question #1 above with respect to each separate panel.

10. Who recorded the vote on the disposition of my case? Was the process recorded? Was there a minority report generated? Provide documentary evidence supporting any response?

11. What is the average time consumed in such an appeal?

When did the board begin its substantive deliberation concerning my case and when did it finish?

I am faxing this document to (703) 604-8542 this day and sending hard copy to the address above. Please call me back for a meeting date after you have obtained answers to these preliminary questions.

Yours very truly,

Paul D. Kerian

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON, VA 22202-4508
17 OCT 1995

SFMR-RBR
KERIAN, PAUL D.
475-70-7412

Mr. Paul D. Kerian 1
95 East Argyle Street
Valley Stream, New York 11580

Dear Mr. Kerian:

This is in response to your letter, dated 7 October 1995, regarding the status of your application for correction of military records.

Your military records still have not been received from the records repository in St. Louis, Missouri. However, efforts still are being made by the support staff of the Board to obtain them.

I am unable to furnish you an anticipated completion date. Upon receipt of your records, your case will be processed expeditiously. You will be advised of the decision.

Sincerely,

David R. Kinneer
Executive Secretary

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4 00 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

September 30, 1994

Mr. Paul D. Kerian
Post Office Box 176
Darlington, Maryland 21034

Dear Mr. Kerian:

This is in response to your letter dated September 12, 1994. An inquiry of your complaint will be conducted by the Department of Defense Inspector General, Special Inquiries Directorate, under Hotline case number 94-L58322.

Hotline inquiries normally require 90 to 180 days for completion. To obtain the status, you may write to the Department of Defense Hotline, The Pentagon, Washington, D.C., 23101-1900, or call toll free at (800) 424-9098, citing your case number.

If you want more specific information or copies of case file documentation, the procedures for filing a request under the Freedom of Information Act are enclosed.

Thank you for your interest in eliminating fraud, waste, and mismanagement from the Federal Government.

Sincerely,
(Sgd)
Ralph E. McNamara
Assistant Director
Operations Division
Defense Hotline

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4 00 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

December 9, 1994

Mr. Paul D. Kerian
Post Office Box 176
Darlington, Maryland 21034

Dear Mr. Kerian:

This is in response to your letters of September 12, 1994 and October 25, 1994 concerning your allegations that an Army Officer Review Board (OSRB) did not grant appropriate relief of your appeal of an Officer Performance Report (OPR) for the period ending May 1991. You alleged that OSRB board members reprised against you for your earlier whistle blowing activity.

In your letter of October 25, 1994, you requested that we interview the OSRG board members prior to conducting our interview with you. We will not comply with your request for the following reason.

When we receive a complaint of reprisal, we first conduct a preliminary inquiry to determine whether the allegations meet the guidelines of Section 1034 of Title 10, United States Code, and whether further investigation is warranted. To this end, it is the complainant's responsibility to ensure that we have the necessary facts to make that determination. Consequently, we will not proceed with your case until such time as you provide that information. If you are uncertain as to the information we require, please contact Ms. Jane Deese of my staff. If we do not receive the requested information by January 6, 1995, we will take no further action on your case.

Should you have any questions, please contact me or Ms. Deese, Office of the Assistant Inspector General for Department Inquiries, at (703) 604-8507.

Sincerely,
(Sgd)
Jeffrey W. Schneider
Captain, Supply Corps, U.S. Navy
Director, Special Inquiries

PAUL D. KERIAN

P.O. Box 176 Darlington,
MD 21034 (410) 457-4835

29 December 1994

Inspector General
ATT: CPT. Jeffrey W. Schneider
Department of Defense
400 Army Navy Drove
Arlington, Virginia 22202-2884

Subject: CASE NO. 94 –L58322; Military Whistle Blower Protection 10 U.S.C. 1034, DOD Dir. 7050.6

RE: Your letter dtd. 19 December 1994

Dear Captain Schneider,

Thank you for your letter of December 19, 1994. I respectfully disagree with your characterization of my case, and ask that you reconsider your refusal to investigate. Unfortunately, the very culture of conformance and reprisal which cause the destruction of my career, threatens to recast the military, a group of law abiding American citizens, into a group of self served opportunists willing to rationalize any misconduct, if they can only advance their careers.

Contrary to your characterization, retaliation was not my for my earlier whistle blowing alone, it was also because those of the OSBR who influenced the decisien on my appeal communicated with those who took reprisal, i.e. BG Huffman and COL Pomager with their coat-tailers and mentors (ORB members and staff shared professional relationships and common military undertakings with these people and were therefore biased against my position). The OSBR asked the people who took reprisal, what they should

do about my complaint! All the while, the OSRB did not inform me of the quality and nature of these ex parte communications, nor did they afford me an opportunity to participate in this process. The OSRB process is defective, a careful investigation of this cas will help you as the Director of IG Special Inquiries understand how and why the OSRB did not do justice when they considered my case.

I have not sought review purely for my sake. It is truly insidious that I have become a teaching point for young attorneys entering the military. The destruction of my career is taught at the Judge Advocate General's School in Charlottesville, VA. I am told by members of successive Judge Advocates (who were once patriotic and idealistic) that I have become an object lesson in what happens to those who attempt to truly defend the Constitution of the United States; the destruction of my career is pointed to as an example of what happens to non-team player who ethically require compliance with the rule of law and the Geneva Conventions when their military superior's personal advancement suggests that they turn and ignore reality in favor of spin-doctored, plausible denial. This is the continuation of an environment which causes massacres.

Regarding your 19 December 1994 request that I conduct your preliminary investigation. How am I to provide you, the investigating agency, with answers to the critical information which only you are privy? Before gaining access to federal Courts, I must exhaust administrative remedies. After the agency (you) conducts their investigation, their decision is received by the courts. In court, I would be able to ask those on the panel which retaliated against me about possible bias. This is the fundamental aspect of the Due Process protected by the American Constitution. At this point, I cannot ask OSRB members questions about their past and present relationships with the people who destroyed my career. This is a basic, fundamental and preliminary issue. I suggested you gather,

as part of the preliminary investigation, basic information regarding possible bias of OSRB members.

During my phone conversation with your offices of 24 October 1994, your representative agreed to grant me a personal interview on the issues presented by my complaint, if I came to D.C. I understand about your limited travel budget and will attempt to arrange other or additional business in D.C. on the day of our meeting My letter of 25 October contained a list a list of preliminary questions you could ask OSRB members. Am I also to understand that for the last two months you and your staff have done nothing to obtaining answers to the preliminary questions I so conscientiously drafted for you? Or did your preliminary receive answers which vindicated my position in this matter? If you wish to conduct the preliminary investigation, I will mail these questions to each member of the board and staff who handled my complaint. Please sign DA JG subpoenas and send them to me so I may enclose them with the questions as I initiate the preliminary inquiry.

Am I to understand your letter of 19 December 1994 as a refusal to interview me? I would appreciate the opportunity to be interviewed by you personally. As a senior military officer who is authorized and empowered to take a look at the work of military branches, consider the enclosed article. Consider the significance of the tangential impact of a sick environment for military lawyers. Millions of illegitimate children! I am sure you will find military lawyers who will say that my enclosed draft article is wrong. In a court of law, where I have an actual chance to present argument and evidence, the ideas I present will prevail.

The substantive matters in the enclosed draft article: SEX AND MILITARY INTERVENTION: A SOLUTION TO ILLEGITIMATE CHILDREN, AMENDMENT OF THE POSSE COMITATUS ACT, THE SOCIAL SECURITY ACT, THE WOLDIERS' AND SAILORS' RELIEF ACT, is

submitted and enclosed for your review and as an IG Fraud, Waste and Abuse complaint. Please initiate another independent investigation and acknowledge receipt for same. The American military is causing and creating millions of runaway "mothers" and "fathers" and neglected children with is programmatic child neglect.

Again, the preliminary question you need to resolve prior to undertaking an extensive investigation into the OSRB action is my OSRG appeal are:

1. Who (all) reviewed my OER appeal? a) when and where? b) who selected the panel of officers which reviewed my appeal? c) how were these officers selected to adjudicate my case? d) provide copies of the assignment order assigning my appeal with a specific panel(s).

2. Who underlined specific portions of my OER appeal with a blue pen?

3. Who underlined with a black pen? Who highlighted with a highlighter?
4. Who consulted a legal advisor on any issues presented in my appeal?

5. Name any and all legal advisors consulted.

6. Who consulted: military officers, NCOs, witness, evidence, or subject matter experts concerning the matters and issues presented in my complaint? When and where did this happen?

7. Who on the Special Panel has worked with (same installation), been stationed or served with (same division or smaller military organization) gone to school with military or civilian school served with or knows personally Col. Richard Pomager, MP officer; (BG) Col. Walter Huffman, JA, former VII Corps and CENTCOM SJA; Col Rupert, former

CENTCOM SJA; BG Thomas Cuthbert, office of TIAG? Describe the quality and nature of the contact or relationship with the 4 officers above if any positive responses is indicated by OSRB members.

8. Were there any ex parte communications by any member of the Special Panel, or their administrative support or advisory staff, with of the people in 7 above? When? Describe nature of communication.

9. Was there a separate panel which independently heard the procedural and substantive aspects of my OER appeal? Answer question #1 above with respect to each separate panel.

10. Who recorded the vote on the disposition of my case? Was the process recorded? Was there a minority report generated? Provide documentary evidence supporting any response?

11. What is the average time consumed in such an appeal? When did the board begin its substantive deliberation concerning my case and when did it finish?

Yours very truly,

Paul D. Kerian

DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF FOR PERSONEL
WASHINGTON, DC 20310-0300

REPLY TO
ATTENTION OF

DAPE-MPC-S (623-105a)
Commander, USTAPC,

MEMORANDUM FOR HQDA (ODSCPER), ATTN: DAPE-ZXI-SP, Room 2D749, Washington, DC 20310-0300

SUBJECT: Freedom of Information Act Request & Privacy Act Request for info related to the 30 November 1993, Officer Efficiency Report (OER) appeal of CPT Paul D. Kerian, and the 29 August 1994 result of that OER appeal.

1. Per your request for information pursuant to the Freedom of Information Act and Privacy Act, the following information, keyed to your questions, is provided:

a. A copy of OSRB SOP or manual of procedure and policy: The DCSPER Officer Special review Board is established under the provisions of DA Memorandum 600-1 and operates under the provisions of DA Regulation 623-105. A copy of each document is enclosed.

b. Who (all) considered and who decided my OER appeal? The OSRB members who considered your appeal are Colonel Jess Franco, Colonel Tom Dana amd LTC (P) Barbara Doornick. Appeals are assigned by the President, Special Review Boards to board members using priority system for appeals as defined in paragraph 9-6, AR 623-105. Appeals are not assigned to board members by assignment orders.

c. Who underlined specific portions of my OER appeal with a blue pen? Colonel King, President, Special Review Boards.

d. Who underlined with a black pen? Colonel Franco. Who highlighted with a highlighter?

Colonel Franco.

e. Who consulted a legal advisor on any issues presented in my appeal? A legal advisor was not consulted. The board proceedings are administrative are not bound by the rules of evidence for trials by court-martial or other court proceedings. The board does, however, keep within the reasonable bounds of evidence.

f. Who consulted: military officers, non-commissioned officer witnesses and others? The Case Summary provides who was contacted and what documents/evidence were reviewed/consulted in the appeal of the process. A copy of the case summary is provided.

, g. Who on the Special Panel has worked with, been stationed or served...? Per DA memorandum 600-1, no member (SRB) will participate as a voter in an appeal in which he or she was personally involved, or in which he or she knowingly has any bias for or against any of the parties concerned.

DAPE-MPC-S
SUBJECT: Freedom of Information Act Request & Privacy Act Request for info related to the 30 November 1993, Officer Efficiency Report (OER) appeal of CPT Paul D. Kerian, and the 29 August 1994 result of that OER appeal

h. Were there any ex parte communications? As discussed in the attached Case Summary.
by any member of the Special Panel, or their administrative support or advisory staff, with of the people in 7 above? When? Describe nature of communication.

i. Was there a separate panel which independently heard the procedural and substantive aspects of my OER appeal? The board members who acted on your appeal are as

indicated in paragraph 1b above.

j. Who recorded the vote on the disposition of my case? The vote was recorded by the President, SRB. There was not a minority report generated.

k. What is the average time consumed in such an appeal? The OSRB/SRB does not keep statistical data concerning processing time. The OSRB/SRB takes whatever time is deemed necessary to thoroughly evaluate the appeal in order to ensure fairness to the officer. The burden of proof does, however, rest with the appellant. the appellant must produce evidence that establishes clearly and convincingly that the presumption of regularity as referred to in paragraph 5-32 and 9-2, AR 623105 should not be applied to the report under consideration.

2. Point of contact is the undersigned at 325-8671.

(Sgd) STEPHEN M. GULYAS
Colonel, GS
President, DCSPER
Special Review Boards

APPENDIX AA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PAUL D. KERIAN,

Plaintiff,

Against

GEORGE W. BUSH, PRESIDENT, THE WHITE HOUSE, WASHINGTON, DC 20530 THOMAS E. WHITE, SECRETARY OF THE ARMYTHE PENTAGON, WASHINGTON, DC 20310DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *THE PENTAGON, WASHINGTON, DC 20301, JOHN ASHCROFT, ATTORNEY GENERAL 950 PENNSYLVANIA AVE. NW, WASHINGTON DC 20530

Defendants.

VERIFIED COMPLAINT

PAUL D. KERIAN
Plaintiff, Pro Se,
195 E. Argyle St.,
Valley Stream, NY 11580
516-825-3835

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Index No CV-00-745

PAUL D. KERIAN,

Plaintiff,

2nd AMENDED
COMPLAINT

FOR SPECIFICAND EQUITABLE
RELIEF FROM
STATUTORY AND
CONSTITUTIONAL VIOLATIONS BY
EXECUTIVE
AGENCIES

GEORGE W. BUSH, PRESIDENT
THE WHITE HOUSE, WASHINGTON, DC 20530
THOMAS E. WHITE, SECRETARY OF THE ARMY THE
PENTAGON, WASHINGTON, DC 20310 DONALD H.
RUMSFELD, SECRETARY OF DEFENSE THE
PENTAGON, WASHINGTON, DC 20301, JOHN
ASHCROFT, ATTORNEY GENERAL 950
PENNSYLVANIA AVE. NW, WASHINGTON DC 20530

Defendants

JURY TRIAL &
CLASS ACTION
CERTIFICATION
REQUESTED

Fed Rule Civ Proc 23

I BACKGROUND AND SUMMARY

1a. Plaintiff, Paul Kerian, a former active duty Army Judge Advocate (JAG), brings this action to remedy violations of his individual rights and those of 4 classes of similarly situated victims. The class actions and causes of action challenge Federal practices which are arbitrary, discriminatory and cause and perpetuate capricious, abusive and illegal. The defective substantive social and legal process' at issue are deliberately and discriminatory maintained under color of law - thus perpetuating, for instance, systemic impunity for war crimes, immunity for reprisal against whistle blowers and blatant discrimination

against "bastardized" children of military service members.

1b. Plaintiff and similarly situated are denied their civil rights as well as fundamental human rights by federal service and related laws, administrative, and legal process, which this suit challenges. The judicial intervention and equitable relief Plaintiff seeks are needed to correct systemic and institutionalized lawlessness. The classes of those wronged, with citation to specific complaints (paragraphs), are detailed in an accompanying Class Action Complaint, in compliance with Federal Rule of Civil Procedure Rule 23. Plaintiff incorporates by reference earlier briefs, pleadings and correspondence filed in this case.

1c. The adverse personal actions and defective "legal" process Plaintiff challenges are examples of Executive branch malfeasance. The administrative or executive branch justice systems Plaintiffs challenge must be reviewed and reconciled with basic notions of Due Process. A Federal judge has the authority and obligation to do so. The non-transparent, *ex parte*, non-accountable process currently used, is a vestigial remnant of an anachronistic hierarchical system of "sovereign impunity". It functions at the expense of fundamental human rights. Plaintiff, a legal officer, refused and refuses to participate in war crimes, discrimination, and illegality. Despite exhausting the DOD administrative "justice" system, he remains officially ostracized and punished for doing the correct and lawful thing. Had Plaintiff not taken the actions resulting in the whistle blower reprisal which terminated his career, he would have been culpably complicit in war crimes; the wrongful denial of fundamental human rights and the rule of law to helpless children and innocent refugees. This reality conveys standing upon the Plaintiff, as an officer of the United States, apart from all other basis described below, and affords this court jurisdiction to resolve the issues presented.

1d. Plaintiff seeks to protect himself and others from the

direct and indirect lawlessness, impunity, unbridled and calumniate "discretion" of Executive branch establishment run amok. Plaintiff contends that the facts presented require equitable relief because they threaten dire future injury. Plaintiff will prove that many Persian Gulf Coalition actions, though pursuant to U.N. Security Counsel Mandate, were, in fundamental respects, criminal. The reprisal or adverse personnel actions Plaintiff suffered were because he refused to be associated or even passively complicit in such criminality. The second military related cause of action or class action (the third is more civil in orientation and directed towards mandating military cooperation in establishing or disproving paternity) seeks to cause the government to train service members on the rule of law and create transparency enhancing mechanisms so service members can comport their activities to the rule of law.

Id. (A) This means allowing military service members more discriminate use of force; allowing military service members to make more informed decisions about who they kill (and not allow to manifest intent to surrender). Currently, people that cause such mass murder see e.g., Seymour Hirsh's (who exposed Vietnam's Me Lai Massacre) May 22, 2000 article in The New Yorker about war crimes during the Persian Gulf war suffer as a result of their participation in mass murder.

Id. (B) Rather than building or maintaining nondiscriminatory, transparent, accountable systems, agents of Executive Branch (conspirators opposed to what the United States stands for) seek to vindicate their self-served exclusive agendas by opposing the International Criminal Court. To do so they buttress impunity, using artifices and ruses (human shields) like the Service Member Protection Act. These impunity seeking so-called public leaders advance their agenda by claiming to be motivated by the need to protect American service members from foreign courts. Yet the "courts" they subject service members to, as

illustrated by the case at bar, bear no relationship whatsoever to the courts of justice fundamental international rule of law requires

1d. (C) The conspirators advance isolationist, unilateral sovereign prerogatives to maintain the impunity of self-served traitors to the rule of law, to treaty obligations and to the principals for which the United States stands. It is these principals of equality, justice and non-discrimination for which hundreds of thousands of American Veterans have fought and died. These same self-served "leaders" would, (between appointments to this board of directors or that) slaughter indiscriminately, tax without representation or mercy so they and their pack of elitist string-pullers, can get away with murder. Acts which violate the Geneva Conventions are aggression, and war crimes, because they lead to more war. Such acts are illegal they require judicial support and enforcement to be effectively outlawed. Such aggression should not remain camouflaged by agents of government using executive branch administrative white wash systems posing as institutions of justice. The white-washing of criminal conspiracy in support of impunity, secret agendas, indiscriminate death, starvation, and degradation of those outside the Executive Branch spoils system of political patronage are the current "non occupational" variation upon the mischief of exploitive, beggar-thy-neighbor, colonial adventurism.

1e. The events of the Persian Gulf conflict and the legal process and environment confronted by Plaintiff, show that absent more neutral and detached executive branch laws, and transparent legal process is needed. Absent such transparent and fair legal process, members of the U.S. military, and behind them the civil population, will be forever "spun up", brain washed, tricked, deluded and lead to conduct or abide indiscriminate slaughter. For what we abide when we have been brainwashed by captive press in service to industrial economy, is war. It is war whether it is napalm or sanction's

and slow tortured starvation and economic strangulation of vulnerable children. Sanctions, pseudo occupation and coalition warfare conducted outside the strictures of the Geneva Conventions, is aggression. Service members tricked into participating in such human debasement suffer (although it often takes a little longer for brainwashed veterans to sift through the fog and PTSD to set in) along with equally innocent, "enemy" however stereotyped and labeled: dinks, slopes, gooks, communists, guineas, nips, rag heads or terrorists. This social pathology of mass murder and human rights abuse we call war, has endured for too long as a "legal" reality. The problem is that it has been historically immunized from judicial review (abstention) and aided by variations upon the impunity maintenance process this litigation confronts. The lawlessness at issue is misconduct "covered" by white wash investigative process under the guise of an administrative or executive branch, justice system.

1f. Plaintiff seeks relief under the Due Process, Liberty, Contract, Equal Protection and Takings clause, Privileges and Immunities Clause(s) and 42 USC 1985 (3) Conspiracy to deny civil rights, with respect to each of these invidious classes of individuals. Because in every instance, Congress, and/or the defendant executive branch agencies, conspired, agreed and acted (overtly), in derivation of Plaintiffs' Constitutional rights, protections and privileges. These agreements, conspiracies or decisions, with attendant concerted acts and/or the inter-corporate activities (acts outside proper scope of federal employment) facilitated or caused legally cognizable injury to the Plaintiff and similarly situated. Evidence of these agreements is a matter of public record, and to be found in the congressional record, executive branch regulations and chronicled in the *de jure* and *de facto* workings of each respective defendant agencies.

1g. The governmental actions described in this complaint invoke this Court's Federal Question and other herein cited

and incorporated basis of Jurisdiction which waive sovereign immunity and mandate the monetary, specific and equitable relief requested.

Plaintiff requests protection from capricious policies, adverse, punitive and inaccurate personnel action(s) and state inaction detailed in the paragraphs below. For related reasons Plaintiff requests specific class action certification, judicial mandate, declaratory, and other equitable relief correcting systemic and programmatic legal deficiencies in Executive branch (DOD & DA) programs, legal process and treaty non-compliance.

1h. Plaintiff seeks compensation for the wrongful taking, without just compensation, of his Army Suggestion Program submission proposing correction of DOD/DA anti-child policy, programs and regulations. The DOD practice(s) at issue interfere with (or fail to reasonably help reconcile) paternity and child support issues. Despite denial of his suggestion for *inter alia,* DNA testing, and a paternity dispute resolution process and denial of monetary reward for its submission, Plaintiff's suggestions have been and partially and incompletely implemented. Plaintiff seeks compensation for his submission and judicial mandate for further implementation of suggested paternity resolution initiative. In an effort to mitigate or help undo the wrongs in which he participated as a legal advisor to putative fathers, mothers and their children, and to avoid in future having to participate in bastardizing innocent children, Plaintiff seeks redress and class action status. Class action status is sought on behalf of "illegitimate" children, custodial care providers and States, variously denied fundamental rights, child support, or recompense from runaway daddies for support and assistance to their " Illegitimate" children. Plaintiff and various other victims in this cause of action are denied parental support and nurturing by discriminatory and unconstitutional DA and DOD policy and programs discriminating helpless children.

1i. Finally, Plaintiff seeks judicial relief and class action

certification in his current capacity as a federal employee of an executive branch agency, U.S. Justice Department (DOJ) where he is employed as a Supervisory Political Asylum Officer for INS, International Affairs. Plaintiff, and similarly situated Executive branch employees employed in non-attorney positions, is/are arbitrarily, capriciously, abusively and discriminatorily denied their right to the outside practice of law in violation of their civil and constitutional rights. Plaintiff and similarly situated are (unequally with respect to other Executive Agency professionals employed in positions outside their field or profession i.e., attorneys, doctors, accountants) singled out and inconsistently, arbitrarily and irrationally discriminated against, through denial Constitutionally grounded Liberty, Property, Contract and 1st Amendment rights as well as Due Process, Equal Protection and civil right to engage in limited, part time, un-conflicted practice of their profession (hold a second job in their chosen profession).

2. **EXPOSITION AND DEFINITION OF SIMILARILY SITUATED AND CLASSES OF PERSONS FOR WHICH CLASS ACTION STATUS IS SOUGHT PURSUANT TO FRCivPro Rule 23 (as supplemented by Class Action Complaint)**

2a. Plaintiff, a former active duty U.S. Army Judge Advocate, was Comrnand Judge Advocate of VII Corps Military Police forces and acting Staff Judge Advocate, 2nd Armored Division, for the Persian Gulf War. Plaintiff, a proud member of the United States military, suffers injury as a consequence of his complicity in war crimes against protected noncombatants and refugees from the Persian Gulf conflict. Plaintiff asserts depression and malaise attend those who enter(ed) combat in the Persian Gulf Conflict because of the unethical, arbitrary and indiscrimina manner in which war was and continues to be waged. Plaintiff cites inadequate treaty implementation, training, information, and

legal process received by member of the U.S. military, which together fail to implement the discriminate use of force and means of war, proportionality, and reasonableness required by the rule of law. Rather, impunity and systems of orchestrated plausible deniability exist where the rule of law is not. Plaintiff, and similarly situated, were, are, and absent judicial or legislative relief, will in future, be forced to be complicit, in war crimes and inhumanity, and feel responsible for needless suffering they have been forced, tricked, misinformed, under-informed and deluded into facilitating (The Persian Gulf Syndrome).

2b. Plaintiff and similarly situated are denied the protection of the rule of law by flawed Executive branch "legal" process and a flawed ethical environment. Plaintiff incorporates by reference into these pleadings the original (or at least readable copies) of Appendix B of the 2 Feb 2001 Declaration of AUSA Artemis Lekakis, wherein Plaintiff specified the date time and circumstances of war crimes and the surrounding both substantive and procedural deficiencies in the ethical and legal environment and process afforded by DOD defendant agencies. The legal and ethical flaws at issue help afford impunity for treaty noncompliance and punishment in reprisal for efforts to stem capricious exercise of authority, fraud, waste and abuse. In the case at bar, whether or not deemed whistle blowing, Plaintiff is being punished for his real time battlefield efforts to mitigate unlawful activity including treaty violations, such as the Breeches of the Geneva Conventions observed by the Plaintiff during the Persian Gulf war.

2c. In the instant case the defective "legal" process provided Plaintiff as a result of his activities (Whistle Blowing), and his request for relief illustrates these Constitutional, Treaty, Statutory and Regulatory deficiencies. As illustrated by this case, the transparency enhancing process and protection required by Congress in monitoring bureaucratic culture, such as Inspectors General,

Whistleblower protection, and Hotline reporting, is frustrated. Having been informed of this DOD, rather than evincing an intent to do justice evidence instead a motivation to punish Plaintiff for his attempts to remedy DOD's capricious denial of the protections of the rule of law to the classes of persons for whom certification is sought. This same activity also evidences executive branch contempt and disregard for Congressional authority; a breakdown in the separation and delegation of power and misuse of authority by a coordinate branch of government.

2d. Plaintiff was abruptly terminated from career enhancing assignments (i.e. combat (field) promotion to Staff Judge Advocate 2nd Armored Division). In numerous other respects Plaintiff suffered injury for mitigating war crimes and providing accurate legal counsel concerning the illegalities of U.S / Persian Gulf Coalition maltreatment of protected persons (Treaty Noncompliance). Significantly, Plaintiff's past refusal to tolerate illegal command influence and his unprecedented acquittal rates as a Military Trial Defense attorney is used by self righteous and complacent insiders to libel, slander and label him a troublemaker who has personality conflicts.

2e. Plaintiff was denied Constitutional legal process, Freedom of Information, Protection of the Privacy Act, Whistle Blower protection, delayed in promotion, fraudulently denied information which was concealed from him even though same was necessary to afford him fair legal process. Plaintiff alleges he was as a result of fraud, deception, denial of information, coercive and duress laden hostile environment and limited time, was constructively terminated and denied other incidents, advantages, privileges and protections of the law, regulation and the Constitution of the United States to include denial of his employment and position as an active duty employee and officer of the U.S. military. Class Action certification and appointment of class counsel to help protect similarly situated (class substantially

described by wrongs addresses in para (1a – 1e) and (2a-2e) above and as further pled below, is hereby requested pursuant to Rule 23 Federal Rules of Civil Procedure.

2f. Plaintiff was improperly denied compensation and implementation of many Constitutionally mandated remedial suggestions he made through the U.S. Army suggestion program on behalf of illegitimate "bastardized" children neglected and denied fundamental rights and protections by irrational, discriminatory and capricious DA/DOD anti-child policy. Putative, potential children of American Service members are denied legitimacy and the ability to establish the paternity and thereby denied civil rights, financial support, medical information inheritance, family, education, medical care, citizenship and nurturers support by a two parent upbringing by discriminatory federal laws. Plaintiff as a legal officer for the U.S. military and participant in the "legal" environment discriminating and denying fundamental civil rights to innocent and vulnerable children suffers past and perspective injury as a result of secondary trauma and emotional abuse consequent to participating in such systemic governmental discrimination. Class Action certification and appointment of class counsel to help protect those harmed (class substantially described by wrongs summarized and described above at para 1h. and 2f and as further pled below) is hereby requested pursuant to Rule 23 Federal Rules of Civil Procedure.

2i. As a current professional employed by an executive agency of the United States Government (Department of Justice, INS) working in a non-professional position, Plaintiff was and is denied civil and constitutional rights authority to engage in the outside practice of law. Class Action certification and appointment of class counsel to help protect similarly situated (class substantially described by wrongs defined and described above at para 1i, 2i and as further pled below) is hereby requested pursuant

to Rule 23 Federal Rules of Civil Procedure is hereby requested.

RELIEF REQUESTED (SUMMARY)

2g. Plaintiff seeks the following basic relief (denominated more fully in wherefore clause (Prayer For Relief) Para. 65) on behalf of himself and similarly situated: Declaratory Judgement that U.N. duty or actions in support of UN Security Counsel resolution vitiate neither obligations under the Geneva Conventions nor U.S. Service member right and obligation to comply with the Geneva Conventions; Judicial writ (equity) directed at Executive branch agencies prohibiting the expenditure of public funds lobbying in opposition to the Treaty of Rome (International Criminal Court) and other activity reasonably likely to influence or otherwise impede implementation of the Geneva Conventions and other such Treaties currently in force; Judicial mandate directed to the Attorney General for the appointment of Independent Counsel to conduct an investigation into executive branch impunity, conspiracy, lobbying activities and the war crimes at issue; an injunction against future U.S military action in UN Chapter VII peace enforcement activities absent reasonable (judicially assured) international treaty compliance (to include training and transparent legal process (notice, opportunity to respond, adequate record and neutral decision makers) to maintain integrity of executive branch legal and decisional processes; an order compelling correction of Freedom of Information Act (FOIA), Privacy Act (PA) and Administrative Procedures Act (APA) violations; an order requiring DOD to provide proper instruction and training to military personnel as to the rights of refugees and the law of war; a judicial writ mandating DOD correction of their programmatic deprivation DOD of fundamental human rights of children; rights protected by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Civil Rights, most especially those

of "illegitimate" children of military personnel in the class in 2f above; the correction of Plaintiff's military and personnel records, an award of back-pay and or reinstatement to active duty; damages for emotional pain and suffering, punitive damages, attorney's costs and fees, and any and other such relief the court deems fair, equitable and within this Court's jurisdiction.

II

JURSDICTION

3. This suit is brought pursuant to the U.S. Constitution and Title 28 U.S. Code 1331, which grants general jurisdiction on the basis of the federal questions presented. This lawsuit seeks to correct ongoing wrongful activities by U.S. Government officials denying protection of law to protected persons, "illegitimate" children, federal employees and U.S. military service members. Jurisdiction to afford the relief outlined herein lies pursuant to the several provisions of the United States Constitution (cited in Para. 1) which incorporates and accords primacy to U.S. Treaties in force. The Federal Statutes upon which relief is requested include: The Declaratory Judgement Act 28 USC 2201-02; the Mandamus Act 28 USC 1361; Civil Rights (prohibiting conspiracy to deny) 42 USC 1985 (3); the Anti-Lobbying Act, 18 U.S.C. 1913; Independent Counsel/Special Prosecutor Act and, if necessary RICO; Freedom of Information Act & The Privacy Act 5 USC 552; The Tucker Act, 28 USC 1346; The Back Pay Act (military) 37 USC 204 et seq.; Military Whistleblower Protection Act; Administrative Procedures Act 5 U.S.C. 701-706; The Equal Access to Justice Act 28 USC 2412 (b) et seq. and the Civil Rights Attorney Fee Awards Act of 1976, 42 USC 1988 (1994).

4. Plaintiff has exhausted administrative remedies in appealing inaccuracies in his military personnel records to Department of Army agencies and was finally notified of his

exhaustion by the Army Board for the Correction of Military Records, 12 February 1996. Plaintiff files this action within the statute of limitations (after exhaustion). Grave Breeches of the Geneva Conventions, and various other exceptions (such as the minority of "illegitimate" children) toll(ed) the statute of limitations with respect to many of the involved issues and allegations.

5. Plaintiff is currently resident at 195 E. Argyle St., Valley Stream, NY 11580.

6. The basis of this Court's personal jurisdiction is Plaintiff's residence within the Eastern District of New York and the herein referenced and or cited grants of subject matter jurisdiction, which variously waive sovereign immunity and mandate the monetary, declaratory, class and/or specific equitable relief requested.

III.
DETAILED ALLEGATIONS

7. The Persian Gulf conflict was a United Nations Chapter VII Peace Enforcement action which took place largely in 1990 - 91. It was, and, to the extent it continues, is, conducted by an international coalition arguably legitimized by United Nations Security Council resolutions and mandates. The UN Security Council authorized offensive military operations to liberate Kuwait from Iraqi aggression and deter such future aggression by Iraq. U.S. Forces, because they operated pursuant to UN mandate did not comply with the Geneva Conventions, instead using the U.N. character of the action and Security Counsel Resolutions as a basis for failing to comply with treaty obligations and customary international law.

8. In particular, the protections of the IV Geneva Convention protecting civilians (GCIV) were violated by coalition forces resulting in the tortured deaths and or

disappearances of thousands of innocent protected persons. The unnecessary, yet highly foreseeable, deaths resulted from the coalition disregard of unequivocal paramount law protecting prisoners and refugees of international armed conflicts, such as the Persian Gulf War. This occurred despite Plaintiff's repeated requests for corrections and investigation of war crimes as required by GCIV. Due to the lack of executive branch investigation into the war crimes Plaintiff sought to resolve while in Southern Iraq many "protected" persons have been shot, refouled, imprisoned. Later, as a continuing consequence these "protected" persons were "disappeared", tortured, starved and poisoned to death in violation of customary and binding treaty and customary international law. For his attempts to prevent and mitigate these highly foreseeable developments, Plaintiff suffers reprisal.

9. Those tortured and killed in violation of international law include many Shiite Muslims from Southern Iraq who were coalition "allies"; prisoners of war captured or granted refuge as protected persons by surrendering or seeking refugee status (denied "prisoner of war" status due to the early conclusion of hostilities) of the United States and coalition allies.

10. The U.S. and coalition forces deliberately induced Iraqi refugees (EPW and protected persons GCVI) to surrender and or otherwise seek refuge from and the protection of the coalition with promises of good treatment. After these protected persons had committed themselves to coalition protection, support was withdrawn and protected persons involuntarily returned, or their refoulement facilitated (conspiracy (impunity) in violation of the Geneva Conventions) to tortured deaths at the hands of the Hussein regime, which considered them traitors. Those subjected to this refoulement were variously imprisoned, disappeared, tortured, starved and poisoned to death, all in direct violation of the promises we made, the Geneva Conventions,

Customary International Law and Treaties ratified by the United States.

11. At the time of most of the events at issue Plaintiff was an active duty Army Judge Advocate occupying positions of Command Judge Advocate and acting Staff Judge Advocate before, during and after the Persian Gulf ground war. From December 1990 through May 1991 the Plaintiff was deployed to various locations in Saudi Arabia, Kuwait and Iraq. Plaintiff, in addition to duties as Command Judge Advocate of VII Corps Military Police forces, was also an S3 action officer Commanding soldiers negotiating mine fields as he lead convoys through combat theaters of operation actively, taking, capturing and transporting enemy prisoners of war (EPW).

12. Plaintiff was deployed to the Persian Gulf with the VII U.S. Corps in December 1990. Plaintiff was responsible for Judge Advocate services to the Corps Military Police Brigade (several thousand military police officers) and was given CORPS wide responsibility for the planning, conduct and legalities of prisoner of war (EPW) operations of VII U.S. Corps, which also included a British Armored Division. He was later given additional theater wide responsibility with respect to civilian refugees and EPW who were not afforded EPW status as a consequence of short duration of the ground war and the negotiated cease fire.

13. After successfully completing the prisoner of war mission, Plaintiff was introduced to the Corps Commander as the Geneva Conventions expert and made the senior on site legal officer to the refugee mission in occupied Southern Iraq and Northern Saudi Arabia. In this capacity Plaintiff was the Acting Staff Judge Advocate of 2nd Armored Division.

14. Plaintiff's services in this later capacity (SJA, 2nd Armored Division) were abruptly terminated. He was

"removed" for attempting to mitigate violations of the GC to include Grave breeches, for repeatedly reporting these war crimes, and for providing legal advice to his Division Commander inconsistent with his superior Judge Advocate's expressed intentions and legal opinion. In advising his superior, the commander of 2nd Armored Division (2AD), Plaintiff disregarded his superior judge advocate's instructions (including his directive that Plaintiff not apprise his Division Commander of his opinions) concerning the illegalities of U.S./coalition maltreatment of protected persons captured or rendered refugees by the conflict.

15. Prior to and after the Persian Gulf war, Plaintiff was an active duty judge advocate of the U.S. Army who invariably received the highest possible rating by every supervisor who ever rated him. Plaintiff was consistently described as an outstanding Trial Defense Attorney, Legal Assistance Officer, Claims Judge Advocate, Prosecutor, International Law Attorney, Trial Observer Chief, (German Trials), Chief, Criminal Law and Command Judge Advocate. Without exception, Plaintiff received the highest possible rating by each and every of his @9 raters of his entire active duty Judge Advocate career. The only efficiency report rating (rating) in which Plaintiff clearly received a below average senior rating in his entire military career, was the senior rating received by Plaintiff for his duty performance during the Persian Gulf war. Plaintiff, as a trial defense attorney was one of the more effective trial defense attorneys in the European Theater during the cold war era.

16. After Plaintiff's return to Germany in late May 91 from the Persian Gulf, and prior to serving in any other capacity, Plaintiff was considered for and denied promotion to Major. Having been passed over (non-selected for promotion to Major) in an "up or out" system, Plaintiff became eligible for the "involuntary" separation money paid to officers being forced to leave the active military service as a consequence of non-promotion. Plaintiff was placed under

severe time constraints by this personnel policy as 2nd pass-over by a promotion board resulted in automatic and immediate involuntary separation and associated stigma. The coercive time constraint required Plaintiff to correct negative aspects of his military records prior to the next promotion board. At the time of Plaintiff's non-selection (pass-over) for promotion to Major, alternate Voluntary Separation Incentives incentive were available to officers denied promotion and as a result, denied continued military service.

17. Plaintiff, knew he could not be promoted as a result of the carefully couched reprisal against his military career (a compendium of faint praise, marginalized assignments, ratings and awards (career-terminate techniques) described more fully in plaintiff's submissions to the SIB and ABCMR incorporated by reference herein. As a result plaintiff filed a whistle blower protection petition with DOD and DA. Plaintiff also wrote letters to the International Committee of the Red Cross and Amnesty International in attempts to help ensure the refugees received the protection they were entitled under international law. Plaintiff, similarly situated, victims (protected persons) and the rule of law, were denied investigation of war crimes by US, coalition and UN impunity, press censorship, misinformation, "spin doctoring" and a cover-up (a continuing war crime) of the violations of Customary International Law (CIL).

18. In addition to denial of his request for investigation, Plaintiff was denied all other protections of the Military Whistle Blower Protection Act (including appointment of counsel). Further, Plaintiff (and several classes of similarly situated veterans) were and are denied fundamental Due Process by an unconstitutional executive branch "legal" process. This lawsuit illustrates the defective nature of the executive branch legal process countless other veterans have suffered. Plaintiff timely appealed the denial

of whistle blower protection from the reprisal he suffered, to the Army Board for Correction of Military Records (ABCMR).

19. The ABCMR, which operates pursuant to Army Regulation as a consequence of a delegation of authority from a Congress intended to decrease the numbers of private bills they entertained relative to veterans, has expansive equitable remedial jurisdiction to correct errors and injustices in military records. The ABCMR, declined to substantively consider the issues presented by Plaintiff. The DA Secretariat, acting through the ABCMR, arbitrarily and capriciously abused its discretion and re-violated the Geneva Conventions, by refusing (aiding and abetting) the prior non-reporting and non-investigation of plaintiff's reports of war crimes. Plaintiff was also improperly denied information he requested pertaining to bias of and conflicts of those involved and was not allowed to meaningfully participate in this legal process, information and answers to questions went unanswered, accountability frustrated, evidence lost " or "destroyed".

20. The ABCMR, and the Army and DOD secretariat, throughout Plaintiff's administrative "legal" process, ignored these war crimes and Plaintiff's complaints. The ABCMR arbitrarily and capriciously abused its discretion by declining to exercise their broad jurisdiction. At first, the ABCMR, based their discretionary declination on the fact that a small portion of the relief and issues presented by Plaintiff were susceptible of redress through appeal of an efficiency report given Plaintiff for his Persian Gulf service (exhaustion).

21. Despite the ABCMR's Capricious denial of jurisdiction, Plaintiff sought to work with the system (sought administrative resolution) and exhausted administrative remedies in seeking to correct the wrongs he witnessed and suffered. Plaintiff took his adverse Officer Efficiency Report (OER) to the Army Special Inquiry Board (SIB). The SIB is

constituted to hear appeals from adverse military efficiency reports. Like the ABCMR, the SIB refused to consider, investigate, look at, or consider the substantive issues presented by Plaintiff. Perhaps they felt constrained because of all the DOD agencies only the Navy specifically recognizes the rule of law. NAVY REGULATION 0705, 14 SEPTEMBER 1990 Observance of International Law. "At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized."

22. Instead, the SIB furthered the ongoing torture, slaughter and refoulement of innocent "protected persons" and Executive Agency whistle blower reprisal by not recommending or undertaking investigation of the underlying illegalities and by refusing to substantively review or investigate Plaintiff's submission. Rather, DOD, DA further abetted the Whistleblower reprisal and ABCMR inaction by punishing Plaintiff further. This was accomplished by concocting an entirely new, previously undisclosed, punitive "remedial" disposition (taking favorable information out of his efficiency report) based solely and exclusively upon a non-substantive procedural issue. Plaintiff thereafter re-appealed this disposition to the ABCMR. Included in this re-appeal to the ABCMR was Plaintiff's request for administrative review of the defective DOD/DA SIB process and procedure and the "star chamber" nature of the proceedings as well as the DOD continuing failure to investigate war crimes.

23. Implicit to the coerced and involuntary nature of Plaintiff's resignation from active military service was the stonewalling and repeated denial of Due Process suffered by Plaintiff. The defendant the Agencies refusal to properly investigate, substantively review their prior actions, or to provide Plaintiff information requested by Plaintiff to

investigate coerced his resignation. Plaintiff's requests to identify biases, predisposition and personal relationships *between panel members and principals to the action were* met with deception and obfuscation. Plaintiff properly requested information pursuant to the Freedom of Information Act (FOIA) and the Privacy Act (PA) in a series of requests and appeals, all of which were wrongfully denied, Plaintiff was denied the information needed to prove his case and establish his entitlement to promotion. The wrongful denial of information, as well as the fraudulent, deceitful, and mistaken denial of information renders Plaintiff's resignation involuntary. The wrongful, fraudulent, deceptive, legally infirm, handling of Plaintiff's whistleblower complaint and requests for appropriate relief to the ABCMR and SIB (Special Inquiry Board (officer Efficiency Report appeals), render Plaintiff's ostensibly voluntary resignation, practically and legally, involuntary as coerced under duress. The environment in which Plaintiff worked contributed to the hostile and coercive environment which, along with the limited time (constraints presented by the impending Plaintiff's impending involuntary retirement (consequent to a second pass-over for promotion to Major) rendered Plaintiff's ostensibly voluntary resignation practically and legally involuntary.

24. The ABCMR denied all relief, thus exhausting Plaintiff's administrative remedies. DOD Agencies have therefore denied Plaintiff every opportunity to resolve this matter. Without the ability to compel the government to release any of the documents or information needed by Plaintiff to establish his case or bring the light of day to the facts, Plaintiff filed the instant action. Plaintiff now requests that this Court take action to afford the relief requested and correct the ethical, moral and legal deficiencies, treaty violations, abuse of discretion, denial of information and illegal deprivations of fundamental human rights presented and implicit to this litigation. As a part of this process, the Court is asked to constitute a class of similarly situated

veterans and protected persons wronged by the impunity and violation of treaty obligations implicit to this litigation. Had the Whistle Blower investigating officer interviewed Plaintiff as repeatedly requested and as he promised in his one surprise telephone call to Plaintiff's house before he went to work in the morning, the Investigator would have had some facts and evidence to work with. The reason the DOD investigator did not interview Plaintiff is clear; the Congressionally mandated protective investigation afforded Plaintiff as a whistleblower was used as a cover-up vehicle; DOD did not want facts and evidence to investigate.

25. The compendium of "evidence" created by the investigating officer does not address the issues underlying the Whistle blower protection petition. The way the matter was handled was a direct and culpable violation of congressional intent defining "whistle blower protection". Rather, the entire "investigation" became a forum for spinning facts libeling and slandering Plaintiff. The investigation's principle focus was to gather evidence to prove that affording Plaintiff neutral and detached legal process would be an injustice.

26. The innuendo gathered against Plaintiff was inaccurate, dishonest, irrelevant, mean spirited, slanderous and entirely one sided. The non-investigation accomplished its intended purpose by turning the entire system against Plaintiff. The legal issues and non- facts were presented to (if not already biased for institutional reasons) what thereafter became bias witnesses and biased administrative panels, advised by conflicted (if not actively biased) legal advisors using ex parte, star chamber proceedings which violate the U.S. Constitution and Federal law.

27. The defective investigation and administrative process was and is part of the continuation of a corrupt pattern of affording impunity to officers whose behavior is the antithesis of the rule of law. The Executive branch "legal

process" afforded Plaintiff and those similarly situated " were part of an impunity maintenance process inconsistent with both what the U.S. stands for and the treaties this country has adopted. The Executive branch agency Defendant's failed to comport their activities with binding international law, binding international treaties, the U.S. Constitution, the laws of the United States and even their own rules and regulations. In response to requests and the legitimate issues raised, Plaintiff (as did the American people during the Persian Gulf war) received non-responsive, after-the-fact, spin doctoring. This same dis-information was also used to bias potential witnesses, confuse issues and probably throw off anyone in the involved agencies (or population) who may have been honestly and legitimately investigating, understanding or concerned about the truth, Plaintiff's written submissions, or the Persian Gulf war.

28. In other respects, the Whistle Blower investigation failed to investigate or address the systematic failure of the system to properly report, investigate and reasonably remedy of violations of the Geneva Conventions, Customary international law and U.N. related laws and process. The behavior Plaintiff encountered was not an isolated instance of agency "un-ethic". In an earlier incident in the same command Plaintiff, while a Defense Counsel, was assaulted in open court by a "superior commissioned officer" (judge advocate) with a lengthy history of jury and witness assault and battery after he was caught by Plaintiff engaging in illegal command influence (obstruction of justice). This superior JA was promoted and Plaintiff punished! In the same way Plaintiff's superior in the Persian Gulf was promoted. Apparently his self-righteous reprisal against Plaintiff strengthened the shield of impunity that sheltered his actions and those complicit. The inter agency fact finding ability and legal process are no match for the good ol' boy network and the close ranks march (and don't think) impunity built into the system.

29. Plaintiff maintains the only way impunity and the plausible deniability of those responsible for violations of law and grave breeches reported by Plaintiff could be maintained was to not interview him. Having neither interviewed nor gathered evidence, those investigating Plaintiff's request for correction of military records and whistle Blower protection focused upon avoiding substantive legal issues except when useful as a means to impose additional reprisal as did the Army in the case.

30. The denial of fundamental protections to protected persons of the Persian Gulf war was not because the means to abide the rule of law were not reasonably available, but because such recognition involved politically and diplomatic "entanglements". It became expedient to treat people without reasonable regard for rules of law affording them transparent process and requiring accountability. The final "durable" solution in this context, was to avail themselves of "the fog of war"; to orchestrate events to allow them to plausibly deny human rights. The apparent intent was to facilitate non-accountability and the illegal return of refugees (refoulement) to Iraq where they would be "resettled", even though it was obvious they would be tortured, maimed, starved, poisoned, "disappeared".

31. Plaintiff, despite mitigating and repeatedly reporting unreasonable treatment clearly constituting war crimes to his technical chain of command, continued to observe illegal treatment of the refugees. Plaintiff, learning that U.S. forces which had earlier moved refugees back into Iraq, were again moving the refugees (after several had been machine gunned to death for protesting their treatment) into the hands of another member of the Persian Gulf coalition. This transfer and refoulement of protected person into the hands and control of other nations, without having first identified them by name, nationality, age, condition, etc., or complying with many other requirements of international law, were grave breeches of the Geneva Convention.

Plaintiff incorporates by reference his requests for whistleblower protection and requests for relief to the ABCMR AND SIB for specifics dates times and events Lakakis exh. B pp _____ . Plaintiff did what was ethically, legally and morally required of him. After first inquiring of his JA superior whether his earlier reports of related war crimes, had been communicated to superior levels of Command and receiving evasive and angry non-responses to his inquiries, Plaintiff told his superior he intended to tell his commanding general 2AD his conclusions. Plaintiff was told not to do so because "we're going home" and this would slow the process down.

32. Plaintiff, as the senior on-site senior legal adviser in Southern Iraq, Acting SJA 2AD, Command Judge Advocate of Military Police Forces, pursuant to binding ethical requirements (Military Rules of Professional Responsibility) took actions legally required by his posting. Plaintiff disregarded the "advise" he received from his Superior JA (it was Illegal Command Influence) which attempted to interfere with his ethical and legal obligation to provide candid legal counsel to his superior commande. Plaintiff felt it was also necessary because it appeared obvious that both IG and JA channels had failed to pass up his reports of violations and were failing to counsel proper processing of refugees to his superior commander. Plaintiff was without lawful alternative. Plaintiff was duty bound to ensure the Commanding General was fully apprised of the legal obligations implicit to the facts on the ground.

33. Plaintiff worked diligently and efficiently to plan and worked tirelessly to train and implement the rule of law while providing Judge Advocate services to a huge population spread across large areas of Iraq, Kuwait and Saudi Arabia. After working to prevent and mitigate violations of paramount law at considerable personal risk the plaintiff's professional reputation and active duty military career was sabotaged for doing simply what the law required.

His career was sabotaged because after assuming duties as the on sight legal advisor and Acting SJA of the 2nd Armored Division, Plaintiff declined to aid, abet or join an unlawful conspiracy and advance an ongoing pattern and practice of Geneva Convention violations.

34. After repeatedly reporting these violations to his supervisory Judge Advocate (JA) and an Inspector General (IG), Plaintiff was forced to go the commanding General and take extraordinary measures to ensure the violations did not continue. Plaintiff was forced to re-expose, at superior level of command, the criminal nature of the ongoing course of conduct he observed. Plaintiff took this action only upon learning that the war crimes he had reported earlier as well as the ongoing unmitigated war crimes being committed at that time were not being lawfully handled. Plaintiff was forced to become a notorious whistleblower (at considerable personal, professional and emotional cost) after attempting and exhausting every less effective alternative.

35. In the end, because no other option was ethically, legally and morally appropriate Plaintiff did what he hoped would not be career suicide. He did the right thing. In order to efficiently encourage reasonable compliance by U.S. forces with the law, Plaintiff vigorously and assertively intervened in face of contrary opinions from superior judge advocates and controvert the legal and factual predicates they advanced before the Division Commander of the 24th Infantry Division..

36. Plaintiff was forced to personally raise the specter of advancing punitive criminal action against his superior commanding General by acquainting him with Plaintiff's willingness to testify against him regarding his (the Commanding General's) personally observed complicity and personal responsibility for war crimes and or treaty violations. The manifest "improprieties" were based not a planned or deliberate consequence of the CG's making,

rather a situation into which the CG had been thrust by circumstance and superior orders. Plaintiff was forced to tell his Commanding General that unless the course of unreasonable treatment given refugees was corrected, Plaintiff would personally testify against him as to his criminal in the pattern and practice of ongoing violations which were Grave breaches of the Geneva Conventions and the law of war. Plaintiff had no intention of being so unequivocal but had no alternative after the CG instructed him that he was wrong, that his bosses, bosses, boss had said that this is the way things were going to be handled and same was legal.

37. Plaintiff's advice to his superiors, the IG and the CG was that the refugees should be counted, IDd, processed; that the age, status etc., assessed, and that their request for refugee status acknowledged and documented and other benefits of their protected status made available to them. What was and had for some time been happening to the refugees was they were being conspiratorially transferred around between coalition members, including across international boundaries, in flagrant violation of their rights, customary and treaty law. The disposition being pursued was to deprive refugees their dignity, Due Process, refuge, subsistence level support, until they forcibly repatriated themselves (as had already happened)) gunned down (therefore Plaintiff's opinion and suggestion he was prepared to testify the CG was personally responsible was no small matter) in food or water riots (as had already happened) as support was improperly withdrawn, or they died of disease (as had already happened).

38. The process of denying Plaintiff relief at every turn of the DOD administrative appeal process illustrates impunity and ongoing criminal conspiracy; all hidden within a command climate and culture populated with persons of utmost of integrity and idealism. Indeed those advancing the conspiracy at issue are in the Plaintiff's opinion, patriots who

number among the finest the United States possesses, the cream of our society – the people who are willing to stand up and be counted upon when the times are difficult. They are persons of character and competence, which make the Plaintiff the termination of his military career and affiliation with the active duty military. As good and competent as these players are, we remain players in a historical human dysfunction known as war. A worldwide sovereign prerogative, or disease, which perhaps only an extra national organization can cure. As the DOD administrative process proceeded, the whistle blower investigators and reviewers become accessories after the fact of a dysfunction with its origins beyond human memory. Plaintiff, on behalf of himself and similarly situated, seeks relief and correction of the defective process, arbitrary abuse of position and institutionalized defects in the executive branch legal and ethical process.

39. Plaintiff took and continues to take the position that a professional must set aside diplomatic, career and political concerns where the law requires. One may never sacrifice the rule of law and human life by placing protected persons (innocent human life) unreasonably, unnecessarily (illegally) at risk.

40. Upon my arrival at the Rhafa refugee camp, (individuals moved repeatedly back and forth across border Iraqi Saudi border) later officially moved to Saudi Arabia, my military superior(s) explained that the refugee population had been physically moved, by U.S. forces, back into Iraq and that the refugees were being weaned from dependency upon coalition forces. Plaintiff was told that the refugees had been forced back into Iraq from their refugee camp in Northern Saudi Arabia back into occupied (but soon to be abandoned) Iraq. Durable solution was being pursued by weaning the refugees from dependence on coalition forces by discouraging their dependency on us (for life sustaining food and water). This, it was explained, was the reason we

helped our allies move them back into Iraq so they would have to return there to obtain the subsistence, food and water they required to survive.

41. After honestly assessing the status of the refugees, I called my superior and repeatedly reported violations of the GC IV. These violations were observed by me and reported to my superior JA. My superior Judge Advocate, in response, ordered me to stay 2 kilometers away from the camp. I was thereafter less able to reasonably mitigate the circumstances of the refugees. I continued to receive reports of inhumane treatment from Military Police officers who I had long worked with who had regular access to the refugee camp, occupied the defensive perimeter a couple of kilometers out, and passed very close thereto, or processed (searched etc. refugees leaving the camp. I reported these violations to my superior. I repeatedly called my superior and reported ongoing violations. He told me that we owed no obligation, that there was no belligerent occupation, it was an Arab problem, that what we were doing was approved by UNHCR who was in over all charge of the refugee operations. I told him I was going to the division commander. He said don't do it. I had not ethical choice but to do so.

42. Reprisal against the Plaintiff was deep and wide. Plaintiff was given a marginal award, ARCOM versus the Bronze Star given other Judge Advocates who, unlike the Plaintiff, rather than enter combat, stayed, for the entire conflict, in the rear areas. Plaintiff, as a consequence of his relief, was also denied an accurate military record records with career enhancing annotations reflecting the fact that he was given a battlefield promotion to Division SJA. This is the kind of objective vote of confidence given officers of high potential (who are needed for continued military service). Plaintiff was denied an efficiency report, which accurately reflected the broad, complex and difficult scope of his duties. As detailed in the administrative process this

complaint appeals, at the conclusion of Plaintiff's administrative appeal process, his OER was even less accurate and fair and more retaliatory than before his appeal.

IV FIRST CLAIM FOR RELIEF
Wrongful Termination/Constructive discharge
Cause of Action and request for Class Action Status
Plaintiff complains of Defendants as follows:

43. Plaintiff repeats and realleges Paragraphs 1 through 42 as though fully set forth herein.

44. The DOD and the US Army intentionally or with reckless to the rights of Plaintiff, protected persons, and other military service members not wishing to participate in war crimes, violated the laws listed cited herein. These violations of law and caused Plaintiff to suffered severe humiliation, embarrassment, and financial and emotional harm.

45. As a result of the DOD and the US Army's unlawful conduct Plaintiff was removed from his position and suffered loss of rank, and forced termination from active military duty. Plaintiff was rendered non-competitive for promotion. For his whistle blower "disloyalty" and candor, Plaintiff suffered the humiliation and professional embarrassment of being relieved from a very important, career enhancing and critical assignment (SJA, 2AD). He was publicly derided at the Judge Advocate General's school he attended at the conclusion of the Persian Gulf war and his humiliation and disgrace held out as an example of what appropriately happens to one who is not a "team player" .

46. As a consequence of DOD and the US Army's action(s) Plaintiff was forced to take part in an illegal conspiracy/course of conduct. Despite his best efforts he was forced to be part of an at least criminally negligent acts calculated to deprive or foreseeably likely to deny protection of the law to combatants and non-combatants of the Persian Gulf Conflict. This was done under circumstances likely to cause death. This causes Plaintiff continuing emotional

distress.

47. Plaintiff, like many Persian Gulf veterans, was forced to participate in war crimes in part due to inadequate training on the law of war given the force. This training deficit was aggravated by misinformation, press censorship, and orders to remain silent about problems. Orders given Plaintiff upon reporting war crimes, i.e. to remain 3K distant from refugee camps were used to force or fraudulently induce him to abet (and not monitor as well as he other wise would) abuse and refoulement of protected persons. Further, transparency-enhancing processes like whistleblower protection, the offices of the Inspector General, Staff Judge Advocate were ineffectual in preventing or arresting the culture of impunity. The Plaintiff, and similarly situated members of the U.S. military are threatened future victimization at the hands of this culture of impunity with its apparent ability to neutralize mechanisms of transparency, by the improper lobbying in opposition to the International Criminal Court by those with unclean hands. The Persian Gulf syndrome means that fear for the average law abiding member of the U.S. military is not that they will be hauled before some International tribunal. Rather, it is that they will be tricked, deluded and denied the opportunity to vindicate their legal and fundamental human prerogatives. It is this historic contra-culture; sovereign impunity itself, which threatens. The Customary International Law of waging war involves considerations of necessity, proportionality and a reasoned balancing (and not partisan political spin mastering) of facts. The Geneva Conventions mandate the reciprocity time has proven necessary to mollify the excesses of war. Even pursuant to U.N. Security Counsel resolution, or when called "Peace Enforcement" or "Peace Keeping", warfare outside the strictures of the Geneva Conventions, threaten reciprocal lawlessness, escalation and future harm. In conjunction with what he has endured, this causes Plaintiff present and continuing and threatens future emotional distress.

48. As a consequence of the steps Plaintiff took to counsel compliance with the rule of law, Plaintiff suffered numerous negative career consequences. Plaintiff he was deprived mention of his battlefield promotion to acting SJA 2nd AD, and suffered the lowest rating of his career (by far considering the escalation,- which, absent reprisal or misconduct, normally attends pre promotion board ratings). The involuntary and unavoidable coerced, fraudulently and criminally induced (whistle blower reprisal) which terminated Plaintiffs career as an active duty Judge Advocate career causes Plaintiff financial, professional, emotional loss.

49. As a result of the intentional acts complained of herein, Plaintiff suffered coercion and duress which together with the fraudulent and criminal conspiracies and misrepresentations in the nature of a continuing conspiracy forced him to voluntarily resign or suffer further reprisal as a consequence of the involuntary removal from the ranks of active duty military officers. Plaintiff suffers the loss of his military career and the pride, espirit de corps, and camaraderie. Plaintiff suffers the loss of his right to serve his beloved country as an active duty military officer; privileges he once shared with his fellow active duty soldiers.

V SECOND CLAIM FOR RELIEF
DEPRIVATION OF LIBERTY, DUE PROCESS AND EQUAL PROTECTION

Cause of Action and Request for Class Action Status

Plaintiff complains of Defendants as follows:

50. Plaintiff repeats and realleges Paragraphs 1 through 49 as though fully set forth herein.

51. The administrative legal process made available to the Plaintiff and similarly situated military employees, violated the 5th Amendment, Due Process Clause of the Constitution of the United States, the Privacy Act, The

Whistle Blower Protection Act, and the Administrative Procedures Act.

52. Plaintiff suffered and was injured by a host of Due Process violations implicit in Executive Branch legal process (Whistle Blower Protections, SIB and ABCMR) which together and/or individually deprived Plaintiff the notice, opportunity to respond and neutral and the detached decision makers which describe Due Process and fundamental fairness. The violations and defective process include, ex-parte communications; lack of or inadequate notice; lack of opportunity to present evidence, inability to respond to or comment upon evidence, and/or dispositions, lack of ability to cross examine, non-requested and previously undisclosed surprise forms of punitive "relief"; lack of opportunity to respond or comment or challenge the neutrality, detachedness and bias(es) of investigators, boards, legal advisors, legal reviewers and decision makers; inadequate and or inaccurate records of investigation, summarized records of conversations deemed testimony never presented for proofing, inadequate proceedings and records with which to challenge or appeal outcomes. The fraudulent, material omissions, wrongful withholdings of material evidence, created a coercive environment such that his "voluntary" separation from the active duty military was under duress, not knowing, willing or informed and therefor, involuntary. The entire process was so unfair and such a joke that the futility of pursuing justice timely before such "juries" was manifest

53. As a result of DOD and US Army conspiratorial activities in denial of Oplaintiff's his civil rights, his fundamental right to Due Process and Equal Protection under the United States Constitution; as well as his rights under the Privacy Act, Whistle Blower Protection Act and the Administrative Procedures Act were denied. Pursuing justice was futile so Plaintiff mitigated damages by accepting separation incentives ratyer than suffer the further humiliation of another passover and mandatory invol8untary separation. As a result of his coerced, involuntary

resignation Plaintiff suffers financial, emotional, and physical harm.

VI

THIRD CLAIM FOR RELIEF

VIOLATION OF DUE PROCESS, DISCRIMINATION DUE TO DISABILITY, DENIAL OF EQUAL PROTECTION TO VETERANS, VIOLATION OF STATUTES PROTECTING DISABLED

Cause of Action and Request for Class Action Status

Plaintiff complains of Defendants as follows:

54. Plaintiff repeats and realleges Paragraphs 1 through 53 as though fully set forth herein.

55. Plaintiff is a disabled U.S. military veteran with a service connected skin disease and damage caused or aggravated by Persian Gulf war time service. Plaintiff's disability and skin damage frequently interferes with Plaintiff's enjoyment of direct sunlight. For his disability he has been granted a 10 % disability and the right to receive disability compensation in the amount of approximately $90.00 per month.

56. The VA has notified the Plaintiff that he was exposed to enemy nerve and chemical gas and agents because Plaintiff was near an enemy munitions plant blown up in Iraq. The Plaintiff as a consequence of the constructive termination of his Military career, which he contests, receives separation pay from the military. Plaintiff's separation pay is reduced by the amount of his VA disability pay. Further, Plaintiff, a member of the military reserve component, has any reserve military pay he earns reduced by his disability pay. Finally, when applicant retires and begins to receive reserve military retired pay at age 60 he will again have this amount (his retirement) reduced by the amount of his disability, thereby taking back his Veteran's disability

pay a third time.

57. The laws and regulations mandating this discriminatory result are directly related to and based upon Plaintiff's status as a disabled person. As such same is invidious class based discrimination based upon plaintiff's membership in a class of disabled former member of the U.S. military who are forced to remain subject to recall to active duty to continue to receive their separation pay. This discriminatory state-of-affairs is a violation of The Rehabilitation Act 29 USCA Section 794 (west 1999) American with Disabilities Act and Due Process and Equal Protection clause of the V Amendment of the US Constitution. Plaintiff is the member of a class discriminated against Because they are disabled in a manner which is different and much more discriminatory than other federal or former federal employees qualified for retired pay. This state of affairs is the result of a conspiracy between executive branch agents who have mis-applied and implemented Congressional guidance without regard to the Constitutional and statutory protections and rights properly required by U.S. law.

VII

FORTH CLAIM FOR RELIEF

WRONGFUL DENIAL OF COMPENSATION AND IMPLIMENTATION OF SUGGESTIONS TO CORRECT DOD/DA POLICY INTERFERING WITH PATERNITY ESTABLISHMENT AND CAUSING CHILD NEGLECT. REQUEST FOR CLASS ACTION CERTIFICATION OF CLASS(ES) HARMED TO SEEK COMPENSATION AND CORRECTION OF STATE ACTION DENYING CHILDREN FUNDAMENTAL RIGHTS TO FAMILY, SUPPORT AND LEGITIMACY.

Cause of Action and Request for Class Action Status

Plaintiff complains of Defendants as follows:

58. Plaintiff repeats and realleges Paragraphs 1 through 57 as though fully set forth herein.

59. Failure to adhere to fundamental international law are implicit in Plaintiff's 4th Claim for relief which confronts the capricious manner in which DOD neglects helpless "illegitimate" children, of service persons. American Service members have evaded financial, familial, and parental responsibility for hundreds of thousands of "illegitimate" children in the several United States and throughout countless other countries of the world. This criminally irresponsible conduct has been aided, abetted, advanced and facilitated by irresponsible and criminal and conspiratorial policy and programs of DOD/DA officers.

60. In 1989 Plaintiff submitted suggestions proposing DOD revise its program of institutionalized child neglect. Plaintiff's suggestions were calculated to mitigated DOD denial of fundamental rights to "illegitimate" children of service members. Despite denial of Plaintiff's suggestion, some of the Plaintiffs suggestions have been partially adopted despite denying his submission or paying him even the token fee offered by the suggestion program.

61. The Plaintiff later filed a Fraud waste and abuse complaint concerning the ongoing DOD policy in contravention of the fundamental rights of "illegitimate" children. Plaintiff now requests judicial mandate implementing his suggestion as required by domestic and international law. Plaintiff requests class actions status for children and/or those who support them who are denied parental support or contribution by DOD practices and programs orchestrated to or having the effect of evading or frustrating inquiry into biological, legal, financial and other attributes and obligations of sex, procreation and parenthood.

VIII

FIFTH CLAIM FOR RELIEF
WRONGFUL DENIAL DUE PROCESS, LIBERTY, CONTRACT AND 1st AMENDMENT RIGHTS GUARENTEED BY U.S. CONSTITUTION.

Cause of Action and request for Class Action Status

Plaintiff complains of Defendants as follows:
Plaintiff repeats and realleges Paragraphs 1 through 61 as though fully set forth herein.

62. After Plaintiff's active duty military service with the U.S. Army was constructively terminated, Plaintiff obtained employment as an Officer of the United States Justice Department (INS) adjudicating and later supervising others adjudicating, applications for political asylum. Officers who work under the Plaintiff's supervision, attorneys and members of the bar who act as hearing officers acting upon requests for political asylum, were granted and retain continuing authority to continue in the private part time practice of law.

63. Inconsistently, and unconstitutionally, the Attorney General of the United States, acting through her agents, arbitrarily, capriciously and in an abuse of discretion, denied Plaintiff, an employee of the United States Justice Department, authority to engage in limited, part-time, (limited as to avoid any or all conflicts or even the appearance thereof) outside private practice of law. 5 CFR Sec 3801.106; DOJ Order 1200.1.

64. The Attorney General's decision to preclude all outside practice of law violates the Plaintiff's, and those of similarly situated Freedom of Speech, (Amend I, US Const) Liberty and Contract rights (Amend V, US Const). The process, analysis or Due Process afforded Plaintiff and others denied their profession violate Due Process and are not adequately tailored to an important enough state purpose (lacks ends means congruence necessitated by the Plaintiff's competing Constitutional interests). The denial also denies Plaintiff Equal Protection of the V Amendment of the US Constitution.

65. **WHEREFORE, Plaintiff prays that this Court enters judgment in his favor and against Defendant as follows:**

a) that a finding be entered that the Defendants intentionally and wrongfully terminated Plaintiff, deprived Plaintiff of Liberty and Due Process, and unlawfully retaliated against Plaintiff, with malice and reckless indifference to Plaintiff's Constitutional, federally protected rights and in violation of his civil rights consistent with the continuing jurisdiction of this court;

b) that Plaintiff be made whole by reinstating him in the career position he would have attained but for the Defendants conduct, with all the rights, concomitant compensation and fringe benefits consistent with the continuing jurisdiction of this court;

c) that Plaintiff be awarded all wages, benefits and compensation lost due to –Defendants conduct consistent with the continuing jurisdiction of this court;

d) that Plaintiff be awarded punitive and compensatory damages when consistent with the continuing jurisdiction of this court;

e) judicial order enjoining future U.S military action in UN Chapter VII peace enforcement, absent full and, if necessary, unilateral U.S. compliance with the Geneva Conventions;

f) a judicial mandate compelling remedial international treaty compliance by U.S. executive branch agencies involved in the Persian Gulf Theater of operations;

g) a mandate to the Attorney General for the appointment of an Independent Counsel to conduct an investigation into war crimes;

h) an injunction restraining the Department of Defense (hereinafter "DOD") employees from expending public funds, or otherwise lobbying in opposition to the adoption of the Treaty of Rome and the International Criminal Court Statute or vitiating or undercutting treaty obligations of the U.S. or any other government;

i) an order requiring DOD to provide remedial and appropriate instruction and training to military personnel as

to the law of war and the rights and protection of protected persons and refugees;

j) a judicial mandate that DOD afford legal assistance, counsel, process, and an effective legal and ethical framework, protected by Due Process and transparent governmental process to ensure the rule of law is protected; a judicial mandate or Declaratory judgement protective of service members' rights to protect their fundamental humanity by allowing knowing participation in the war fighting process; a judicial mandate or declaratory judgement that all members of the U.S military be allowed to reasonably attempt communication with those who they would kill; a judicial mandate or Declaratory judgement protecting U.S. service persons rights to reasonably allow "enemy" to manifest an intent to surrender before they kill them; a judicial mandate protecting U.S. service persons' right to reasonably appraise themselves and when possible to reasonably afford opposing combatants and protected persons other wise susceptible to being "collaterally damaged" enough information to allow each to independently make a decision about what to do (surrender or not): a judicial mandate entitling U.S. servicepersons access to information sufficient to allow them to assess the necessity and proportionality of response consistent with international law; a judicial mandate or Declaratory judgement requiring systems and processes of transparency to maintain the integrity of information exchange detailed above and to allow anonymous (through counsel) reporting of war crimes and illegal acts with expeditious recourse to the Civilian Federal Judiciary;

k) to the extent Plaintiff's suggestions with respect to paternity dispute resolution and child support have not been implemented by the Army, judicial mandate for their implementation, and a token financial award in the amount of $.02 to the Plaintiff for his suggestion(s); that this court constitute a class and appoint counsel and mandate corrective response by DOD to redress the deprivation of fundamental human rights and discrimination caused by DOD/DA

programs addressed in Plaintiff's suggestions related to establishing and protecting the legitimate and fundamental rights of the children of military personnel;

l) declaratory judgement and or a judicial order affirming or mandating Department of Justice recognition of Plaintiff's (and similarly situated) right to limited outside practice of law;

m) damages for emotional pain and suffering, consequential and punitive damages consistent with the continuing jurisdiction of this court, and

n) attorney's costs and fees, courts cost, fees and expenses and any and other such relief the court deems fair and equitable;

o) Appointment of counsel to protect Plaintiff's rights as envisioned by Congressional mandate of the Military Whistle Blower Protection Act; Appointment of Special Master (to be paid out of DOD judgement fund) or Federal Magistrate Judge, to inquire to preserve facts and evidence or explore class constitution issues, develop remedial alternatives and preserve facts and evidence where executive privilege, national security or attorney work product privilege may other wise preclude efficient discovery;

p) Appoint class counsel (direct DOD, JA to afford) or other wise to secure appropriate counsel or sanction delay and other reasonable efforts by Plaintiff to recruit class or sub class counsel as appropriate based upon the courts certification of classes and sub classes as necessary to protect rights of others in classes of similarly situated and or injured;

q) that Plaintiff and Plaintiff's co-counsel be awarded reasonable attorney fees, costs, enhancements and expenses of this litigation, including costs and fees associated and judicial enforcement of FOIA, APA and PA violations enforced as a consequence of this litigation and counsel pursuant to the Equal Access to Justice Act, 28 USC 2412 (b) (1994); Civil Rights Attorney Fee Awards Act of 1976, 42 USC 1988 (1994);

r) Judicial ruling, Mandate or Declaratory judgement correcting discriminatory and unconstitutional treatment,

training or protection of civil rights of military service persons and disabled veterans;

s) Judicial ruling, Mandate or Declaratory judgement correcting or finding discriminatory and unconstitutional treatment of service members advanced or facilitated by military rules of professional responsibility. The rules of ethics for military attorneys are inapplicable to the environment in which they must operate because they are collusive and protective of impunity, encourage "yes man" mentality, secrecy, and rationalization as opposed to the neutral, detached and objective advice (inordinate JA regard for career considerations and the agenda of superiors whom they advise) at the expense of the rule of law and the Treaties of the United States;

t) Due to likelihood of success on the merits, the court direct that Plaintiff be granted paid administrative leave from his present position with DOJ to prepare and litigate issues pertaining to employment with DOJ and issued military orders placing him upon an active duty military status to prepare and litigate military related issues;

u) That Plaintiff and similarly situated be awarded such other relief as this Court may deem just and proper to include prejudgment interest on monetary awards.

Dated: / signed/ / January 10, 2002

PAUL D. KERIAN
PRO SE PLAINTIFF

Valley Stream, NY 11580

(516) 825-3835

APPENDIX BB
PETITIONER/WHISTLE BLOWER'S ARMY OFFICER EFFICIENCY REPORTS BEFORE (Clean legible) AND AS "CORRECTED" (dark voided) USING ARMY WHISTLE BLOWER PROTECTION PROCESS AND ADMINSTRATIVE APPEALS

DUNCAN, PAUL D. [redacted]-7412 CPT 85 18 01 JA 55

HHC, 14th Military Police Brigade, APO 09746 USARCENT — #3 | Change of Rater

Period Covered						Days	Code
From			To				
90	12	06	91	05	12	5	0246

HARBER, VICKI L. — 492-54-1643

LTC, MP, 14th Military Police Brigade — Deputy Brigade Commander — 22 MAY 1991

HUFFMAN, WALTER R. — 454-72-7206

COL, JA, VII Corps Staff Judge Advocate — 19 June 91

02 MAY 1991

Brigade Judge Advocate

Brigade Judge Advocate of the 14th Military Police Brigade, the largest military police brigade to deploy on Operation Desert Shield/Storm. Judge Advocate administrative and supervisory responsibilities spanned the entire range of legal services to include: criminal law, administrative law, legal assistance, international law and claims. Additional duties include Corps-wide operational responsibility for the planning and execution of enemy prisoner of war operations. The 14th Military Police Brigade contained 20 full strength companies consisting of regular army MP battalions deployed from Germany and National Guard MP Battalions deployed from CONUS.

	HIGH DEGREE			LOW DEGREE	
	1	2	3	4	5
1. Possesses capability to acquire knowledge/apply concepts					X
2. Demonstrates appropriate knowledge and expertise in assigned tasks					X
3. Maintains appropriate level of physical fitness 9909 PASS					X
4. Motivates, challenges and develops subordinates					X
5. Performs under physical and mental stress					X
6. Communicates orally and in writing					X
7. Clear and concise in written communication					X
8. Displays sound judgment					X
9. Works well with others					X
10. Is adaptable to changing operations					X
11. Sets and enforces high standards					X
12. Possesses military bearing and appearance 72/185 YES					X
13. Supports EO/EEO					X
14. Cares and counsels in and counsels					X

(a1,2) Intelligent and articulate, extremely knowledge in all legal areas
(a3) Sets the example
(a10) Proven in combat
(b1) Totally dedicated to mission; does whats right
(b3) Absolute
(b4) Has the courage to say whats right, regardless of outcome

OCT 07 1991

DA FORM 67-8

BEST AVAILABLE COPY

Kerian, Paul G. -7412

X

CPT Kerian's performance of Brigade Judge Advocate was truly outstanding. Paul established an effective legal program within the 14th Military Police Brigade. He was quick to react to potential legal problems before they reached crisis level. Personally responsible for ensuring Enemy Prisoner of War Operations were conducted within the parameters of the Geneva Convention and international law. Paul was always timely and accurate with legal advice. His ability to train, educate and motivate Military Police men and women was a major factor in the brigade's overall success at managing the EPW mission from a legal standpoint. He continually ensured that all Brigade legal actions were quality products and that they met all legal requirements for completeness and legal sufficiency. Paul's support to the Brigade and subordinate commands in accomplishing these missions was absolutely top-notch. A true professional that will go to any length to accomplish the mission.

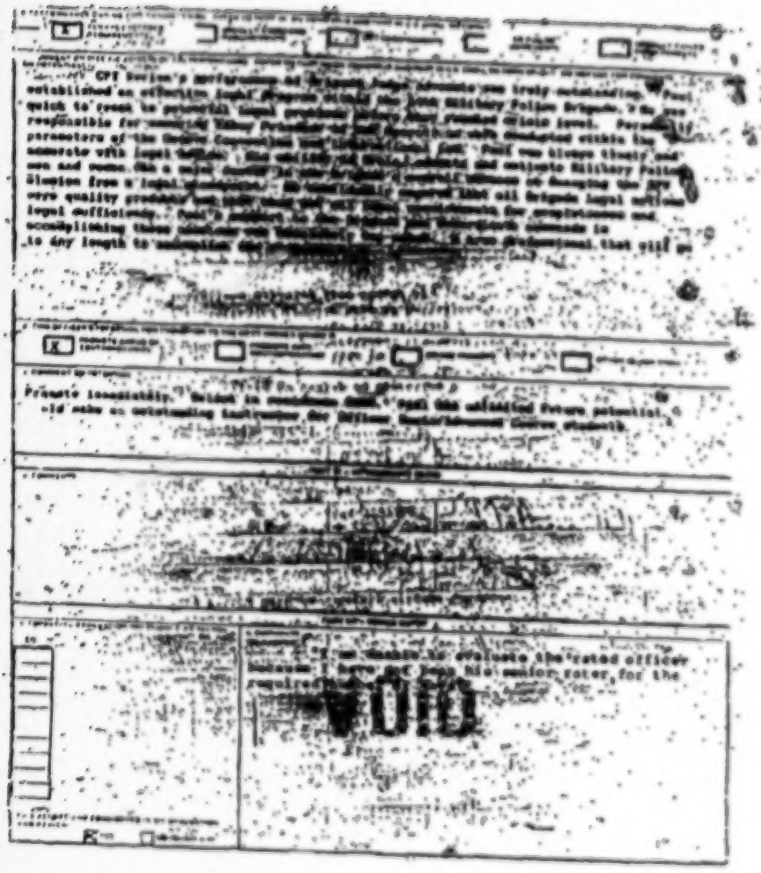
X

Promote immediately. Select in residence CGSC. Paul has unlimited future potential. Would make an outstanding instructor for Officer Basic/Advanced Course students.

X

CPT Paul Kerian did a fine job as MP Brigade Judge Advocate during Desert Shield/Storm, and in the critical area of Enemy Prisoner of War operations, Paul was truly exceptional. Paul was the key player in developing a legally correct EPW plan, training MPs on the plan, and executing it. During the ground war, the Brigade Commander asked CPT Kerian to join the EPW Ops cell at the Corps PW Cage, and he served with distinction in that position in both Saudi Arabia and Iraq. Paul has both physical and moral courage in abundance, and will go anywhere to do anything. On occasion, Paul's effectiveness is hurt by overzealousness, but overall he was an excellent Brigade JA who made an immense contribution. Select for positions of increasing responsibility and promote.

OCT 87 1990



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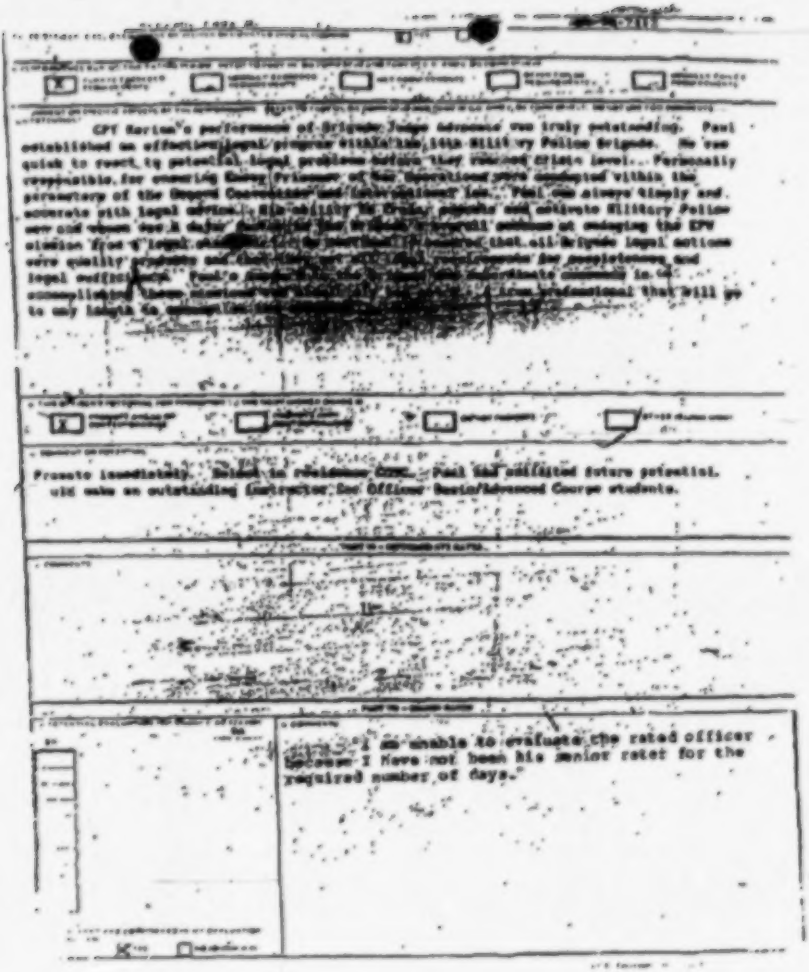

CPT Gorina's performance of Brigade Judge Advocate was truly outstanding. Paul established an effective legal program within the 14th Military Police Brigade. He was quick to react to potential legal problems before they reached crisis level... Personally responsible for ensuring Enemy Prisoner of War operations were conducted within the purview of the Geneva Conventions and international law... Paul was always timely and accurate with legal advice... His ability to brief brigade and battalion level commanders on military justice matters was outstanding... Paul's initiative in developing [illegible] to ensure that all Brigade legal actions were quickly prepared and thoroughly reviewed for completeness and legal sufficiency... Paul's [illegible] was instrumental in the successful accomplishment of numerous [illegible] missions... He is an extremely motivated officer who will continue to be successful in any [illegible] he undertakes. I recommend Paul be promoted immediately. Without reservation, CPT... Paul has exhibited future potential. He is also an outstanding instructor for Officer Basic/Advanced Course students.

I am unable to evaluate the rated officer because I have not been his senior rater for the required number of days.

000336

A392